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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 15904 ✓

CROWN ZELLERBACH CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITIONER'S REPLY BRIEF

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July 20, 1959

FILED

JUL 20 1959

PAUL P. O'BRIEN, CLERK

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IN THE
United States Court of Appeals
For the Ninth Circuit

CROWN ZELLERBACH CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

No. 15904

PETITIONER'S REPLY BRIEF

The order of the Commission must be set aside because the essential findings of fact of the Commission are not supported by substantial evidence on the whole record. As this Court stated in *Carter Products Inc. v. FTC* (9th Cir., June 16, 1959, No. 15,373):

“The [Federal Trade Commission] Act prescribes that the findings of the Commission as to the facts, if supported by evidence, shall be conclusive on a reviewing court. 15 U.S.C.A. §45(c). The Administrative Procedure Act added the further requirement that to be valid, the findings of federal administrative agencies must be supported by *substantial* evidence in the record considered as a whole.” (Emphasis in original)*

* Section 11 of the Clayton Act, as amended (64 Stat. 1126, 15 U. S. C. § 21; amended 72 Stat. 943), and Sections 7(c) and 10(e) of the Administrative Procedure Act (60 Stat. 241, 243, 5 U. S. C. §§ 1006(c), 1009(e)) similarly require that findings of the Commission in a proceeding under Section 7 of the Clayton Act be supported by substantial evidence on the whole record.

The Commission, however, does not even attempt to refer to substantial evidence on the whole record to support its crucial finding that "Census coarse paper" is the relevant "line of commerce", without which finding its decision cannot stand. The Commission makes no effort to satisfy the requirements of Section 11 of the Clayton Act, as amended, and Sections 7(c) and 10(e) of the Administrative Procedure Act.

Instead, the Commission espouses a topsy-turvy theory of law that only *after* the competitive consequences of an acquisition have been examined need the relevant line of commerce be "specified" and that it need never be proved (Comm. Br. 91, 236-237). This novel theory, which is inconsistent with the Commission's own decision in this case and with the other decisions under the amended Section 7 of the Clayton Act, was evidently conceived as a last-gasp substitute for the requirement that the Commission's order be supported by the reliable, probative and substantial evidence in the record considered as a whole (Administrative Procedure Act §§7(c) and 10(e)). On no other basis could one explain the Commission's failure to give a single citation to the evidence in the record to support its crucial finding that the "Census coarse papers"—wrapping, bag, shipping sack, waxing, gumming, envelope and other converting papers—constitute a discrete product market, *i.e.*, a "line of commerce" within the meaning of Section 7.

Nor does the Commission refer to substantial evidence on the whole record to support its findings:

(i) that the 11 western states are a geographic market, *i.e.*, a "section of the country" within the meaning of Section 7; and

(ii) that the effect of Crown's acquisition of St. Helens may be substantially to lessen competition or to tend to create a monopoly in the sale of "Census coarse papers" in the West.

A further, and independent, compelling reason why the Commission's order must be reversed is the Commission's inability to answer our demonstration that Crown was deprived of its Constitutional right to a fair hearing according to due process of law.

The Commission's market findings are not supported by substantial evidence

We demonstrate in Point I below that the Commission concedes that there is no substantial evidence to support its finding that "Census coarse paper" is the relevant product area of effective competition (*i.e.*, "line of commerce").

Instead of attempting to support its finding that "Census coarse paper" is the relevant product market for this case, the Commission devotes itself to an unsuccessful attack on the trade coarse paper line of commerce which Crown proposes and which the evidence shows is the relevant line of commerce. In so doing, the Commission expressly contradicts each and every reason it gave in its opinion to support its own "Census coarse paper" line of commerce.

In Point II we show that the Commission has also failed to support its finding that the "11 western states" are the relevant geographic area of effective competition (*i.e.*, "section of the country").

The Commission relies on irrelevant and incorrect statistics and on bits and pieces of evidence, practically all of which relate only to purchases of wrapping paper (one of the many papers classified by the Census as "Census coarse paper") by paper jobbers (one of the many types of purchasers of papers classified as "Census coarse paper") in the Pacific Coast states (three of the 11 western states).

The Commission ignores the pattern of Crown's and St. Helens' sales of Census coarse paper grades, the substan-

tial shipments of Census coarse paper grades into the West, and all the other evidence proving that the West is not an isolated market.

**In order to excuse its failure to prove the
relevant market, the Commission proposes
a fallacious theory of law**

Put for the first time in its history to the test of supporting its line of commerce and section of the country findings by reference to substantial evidence, and recognizing its inability to do so, the Commission proposes an upside-down approach to Section 7 which would read the requirement for market definition out of the statute.

The Commission poses the Section 7 questions in the following reversed order:

“Did the Commission properly conclude that the merger had the proscribed statutory effect?

“Is the Commission’s determination of the relevant market, geographically and product wise, supported by substantial evidence?” (Comm. Br. 17)

and entitles Point I of its brief:

“The effect of the acquisition ‘may be substantially to lessen competition or to tend to create a monopoly.’ ” (Comm. Br. 28)

The Commission’s asserted justification for examining competitive consequences (without reference to any market) *before* determining the relevant market is, as it states throughout its brief, that

“Only after the probable competitive consequences of a merger have been identified and examined is it appropriate to select [Note: not *prove*] the particu-

lar market or markets with respect to which the competitive consequences shall be formally tested.” (Comm. Br. 33, 91, 93, 129-130, 140, 167, 236-237)

There is not a single citation anywhere in the Commission’s brief to support this distorted legal theory that the relevant line of commerce should be “selected” after the case has been decided.* The command of Section 7, as well as the cases under Section 7, are explicitly to the contrary.

Section 7 makes unlawful an acquisition

“ . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”

Thus, it is essential to determine the relevant market (the line of commerce and the section of the country) *before* analyzing the evidence on the question whether there may be a substantial lessening of competition or tendency to monopoly *in that market*.

“ . . . the ban on a substantial lessening of competition ‘in any line of commerce in any section of the country,’ requires, for determination of a violation, *first*, a definition of a relevant market in which a lessening of competition has probably occurred

* The Commission claims in this Court that it took the same approach below, to wit, that in determining the relevant line of commerce and the relevant section of the country, it took into consideration the product and geographic areas where the alleged “illegal impact” of the merger supposedly occurred (Comm. Br. 93, 129-130, 167). That is not so. There is not a word in the sections of the Commission’s opinion dealing with the line of commerce and the section of the country respecting the alleged “illegal impact” of the merger (R 608-613). That discussion is where it belongs—in the section of the Commission’s opinion which discusses the alleged effects on *competition in its market*, which section *follows* its discussion of market definition (R 613-619).

and, *second*, analysis of the nature and extent of the competition *within that market*.” (*American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F. 2d 524, 527 (2d Cir. 1958); italics added)

Likewise, the Supreme Court stated in the *General Motors* case, *United States v. E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 593 (1957):

“*Determination [*] of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition ‘within the area of effective competition.’ Substantiality can be determined only in terms of the market affected.*” (Italics added)**

The Commission’s finding of an adverse effect on competition is not supported by substantial evidence

The Commission’s argument on the competitive consequences of the acquisition is discussed in Point III below.

We demonstrate there (i) that the Commission mistakenly equates western *production* of the papers classified by the Census as Census coarse papers, with western *supply* of those papers, and disregards *sales* within the West, and (ii) that the Commission addresses its argument to only a small part of its relevant “market”, whereas (iii) all the evidence proves that there is no reasonable probability that Crown’s acquisition of St. Helens will result in substan-

* *General Motors* requires that the relevant market be *proved* and not merely “selected” (see also Pet. Br. 36, 120-121, 170-172).

** To the same effect: *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 583 (S. D. N. Y. 1958) (see also Pet. Br. 35, 120-121, 170-172).

tially lessening competition in, or in a monopoly of, even the narrow and unsupportable “market” found by the Commission.

Crown was not accorded a fair hearing

The Commission admits that its incompetent and biased survey report, and the equally incompetent and biased testimony of its economist based thereon, were improperly received in evidence. It asserts merely that this was not prejudicial to Crown. Our *proof* that it was prejudicial, against the Commission’s unsupported *assertion* that it was not, is discussed in Point IV.

We also demonstrate in Point IV that the Commission (i) concedes that it refused to define what it claimed to be the relevant line of commerce until after the record was closed and (ii) admits that it failed to amend or to dismiss its complaint after the allegations of the complaint were disproved; instead, it rested its decision upon a supposed violation wholly different from that alleged in the complaint.

Essential findings and conclusions of the Commission are indefinite and uncertain

In Point V we discuss the Commission’s unsuccessful attack on our showing that three of the findings and conclusions upon which its order is based are indefinite and uncertain and, therefore, do not comply with the requirements of Section 11 of the Clayton Act, as amended, and Section 8(b) of the Administrative Procedure Act.

The Commission has failed to respond to our specification of the errors committed below

The Commission's failure to respond to the detailed specification of its errors set forth in the appendix to our main brief is discussed in Point VI.

The Commission's order is not authorized by Section 11 of the Clayton Act

In Point VII we discuss the fact that the Commission exceeded its powers under Section 11 of the Clayton Act, as amended, in framing its order of divestiture.

POINT I

The Commission concedes that its finding that "Census coarse paper" is the relevant line of commerce is not supported by substantial evidence and thereby confesses reversible error.

The first issue in this case is whether the Commission's narrow and unrealistic "Census coarse paper" line of commerce is supported by substantial evidence on the whole record, as required by Section 11 of the Clayton Act, as amended, and Sections 7(e) and 10(e) of the Administrative Procedure Act.* We demonstrate below that the Com-

* See p. 1n, *supra*. Section 7(c) of the Administrative Procedure Act provides:

" . . . the proponent of a rule or order shall have the burden of proof . . . no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence."

mission's line of commerce finding is not supported by substantial evidence on the whole record.

We also demonstrate that the line of commerce established by the evidence consists of the grades of paper which are referred to in the trade as "coarse paper" and which the Hearing Examiner and the Commission in their opinions referred to as "trade coarse paper" (R 572, 609).*

The Commission prefers not to argue the issue whether its "Census coarse paper" line of commerce finding is supported by substantial evidence on the whole record; instead, it confines itself to a diversionary attack on the trade coarse paper line of commerce (Comm. Br. 89-140).

A. The Commission affirmatively destroys its "Census coarse paper" line of commerce finding.

1. The Hearing Examiner's argument in support of his "Census coarse paper" line of commerce finding was admittedly indefensible.

In their proposed findings, Commission counsel urged the Hearing Examiner to find several different lines of commerce (R 336-337), none of which, however, was the "Census coarse paper" line of commerce which the Hearing Examiner did find and which was later adopted by the Commission. The Hearing Examiner concluded:

"The line of commerce involved in this proceeding is the various papers falling within the Census

* Trade coarse paper includes all the grades of paper listed in the following nine categories of the Bureau of the Census classification system for reporting production statistics: Census coarse paper, Census special industrial paper, Census sanitary tissue stock, Census tissue paper except sanitary and thin, Census container board, Census bending board, Census nonbending board, and Census special paperboard stock. Trade coarse paper also includes the converted paper products made from the papers reported in these nine Census categories. (Pet. Br. 158-160)

category of coarse papers. About 84 per cent of the production of St. Helens was Census coarse papers. [Crown] produced 51.5 per cent of the total of Census coarse papers produced in the eleven Western States. *Consequently* Census coarse papers is the line of commerce principally affected by the acquisition. . . . *Since* the greater proportion of the production of both [Crown] and St. Helens was in the category of Census coarse papers, the area of effective competition as to products would be within that category.” (R 589-590; italics added)

The Hearing Examiner could find nothing to say in support of his “Census coarse paper” line of commerce finding except the *non sequitur* quoted above (Pet. Br. 176-177).*

2. The Commission adopted the Hearing Examiner’s “Census coarse paper” line of commerce, but rejected the Hearing Examiner’s “reasoning” as incorrect and stated its own “rationale”.

In response to Crown’s argument that a line of commerce must be proved and not merely asserted and that the Hearing Examiner’s “reasoning” was completely inadequate to support his finding, the Commission took a different tack. It stated:

“ . . . a question for determination is whether or not the coarse paper line, including wrapping, bag and sack papers and converting papers, which the hearing examiner refers to as Census coarse papers, is a ‘line of commerce’ within the meaning of the Clayton Act.

“All such papers are in a relatively allied line, particularly in respect to markets and end uses. . . .

* The statement is not even factually correct; Census coarse paper grades were *not* “the greater proportion of [Crown’s] production” (RX 62, p. 19).

Such factors as physical characteristics, markets, prices, and uses, all or in part tend to distinguish these papers from other papers and paperboard.

* * * * *

“It is our opinion, in view of the foregoing considerations, that the coarse paper line relating generally to coarse wrapping papers, bag and sack papers and convertible papers is a sufficiently distinct product line to be a ‘line of commerce’ within the meaning of Section 7. To the extent that the hearing examiner relied on factors other than those mentioned in this opinion in determining the relevant line of commerce, the initial decision does not represent the view of the Commission.” (R 610-612)

However, in briefing this question to this Court, the Commission finds that its own rationale is as indefensible as the Hearing Examiner’s.

3. The Commission now concedes that its own rationale is also indefensible.

Early in its brief, the Commission recites that St. Helens’ production fell largely in the Bureau of the Census category of coarse papers and that those papers, *i.e.*, Census coarse papers, accounted for 84% of St. Helens’ production (Comm. Br. 35). *Immediately following* this recital, the Commission states:

“Having identified the significant product area . . . the next question for determination is the significant geographical area” (Comm. Br. 36; italics added)

This is the *identical* “reason” given by the Hearing Examiner and rejected by the Commission (R 589-590, 612; Pet. Br. 176-177). Yet, nowhere in its brief does the Commission give any other reason or refer to any evidence to support its Census coarse paper line of commerce finding.

Thus, although the Commission properly states the question before this Court:

“Is the Commission’s determination of the relevant market, . . . product wise, supported by substantial evidence?” (Comm. Br. 17)

it never attempts to answer that question. In fact, the admissions made by the Commission during the course of its line of commerce argument (Comm. Br. 89-140) constitute a clear concession that its unrealistic Census coarse paper line of commerce *cannot* be supported by substantial evidence.

4. The Commission destroys its “Census coarse paper” line of commerce finding.

The evidentiary issue is presented by the Commission thus:

“. . . the question is this: Are the product line papers [the Census coarse paper grades] distinguished from other papers by such factors as peculiar characteristics and uses, markets and price behavior?” (Comm. Br. 92)

The Commission then argues that trade coarse papers, other than those classified by the Census in its “coarse paper” statistical classification, are different in end uses, physical characteristics, prices and markets from the “Census coarse paper” grades, and that therefore they cannot be part of the same line of commerce. The Commission’s theory is that the physical characteristics of papers are determined by the end uses to which they are applied and that papers which serve different, and largely noncompeting, end uses are not in the same product market (Comm. Br. 94-95).

However, the Commission is forced to concede that there is just as much difference in end uses, physical characteristics and prices *among* the papers classified as Census coarse paper as there is *between* (i) the Census coarse paper grades and (ii) the other trade coarse papers. The conclusion that the Commission necessarily draws from its own argument is that its own Census coarse paper line of commerce and Crown's asserted trade coarse paper line of commerce are *both* invalid.

Thus, the Commission argues that there are such differences *among* wrapping paper, bag paper, shipping sack paper, envelope paper, waxing paper and gumming paper (all Census coarse paper grades) that these various Census coarse paper grades are sold in several *different* markets, and represent several *different* lines of commerce.

In other words, the Commission not only concedes but affirmatively asserts that there must be a negative answer to its own question, to wit: Is there substantial evidence on the whole record to support the Commission's finding that the Census coarse paper grades *together* constitute a line of commerce?

It is not surprising, therefore, that the Commission tries to read the necessity for market definition out of Section 7 by proposing an upside-down and fallacious theory of law.

(i) *The Commission's own description of the Census coarse paper grades points up differences among papers classified as Census coarse paper, in terms of physical characteristics, end uses and markets, which, on the Commission's erroneous approach, would put each of the grades and types of Census coarse papers in a separate market:* After pointing out that papers classified as Census coarse paper are used mainly for wrapping and packaging (while conceding in a footnote that its line of commerce includes

only certain papers and not all wrapping and packaging materials; Comm. Br. 94-95), the Commission asserts:

(1) Wrapping papers are used as a wrapping material, but vary among themselves in weight, color, strength, waterproofing, density and "the like" (Comm. Br. 95-96);

(2) Bag papers come in different weights and are used to make many different kinds of bags, and differ importantly from wrapping papers in their "sizing" (Comm. Br. 99);*

(3) Shipping sack paper is converted into shipping sacks and is then sold principally to cement and fertilizer companies; it differs from bag papers in that it is produced to particular technical specifications (Comm. Br. 100-101);

(4) Waxing paper is used by converters of waxed paper products and differs from other Census coarse paper grades in that it is coated with wax or paraffin and is widely used as a bread wrapping (Comm. Br. 102);

(5) Gumming paper is used to make gummed tape and differs from other Census coarse paper grades in that it has special characteristics of strength, waterproofing and density (Comm. Br. 102); and

(6) Envelope paper is sold to envelope manufacturers and, the Commission argues, there are two non-competitive grades of envelope paper, depending upon whether the pulp used in making the paper was pro-

* "Sizing", generally, is that property of paper which relates to its resistance to the penetration of liquids or vapors, particularly water (*The Dictionary of Paper* (1951 ed.), p. 328; this reference work is cited by the Commission several times in its brief (Comm. Br. 35, 99, 100, 102) pursuant to stipulation (R 2820).)

duced by the kraft (sulphate) process or by the sulphite process (Comm. Br. 102-103).*

After asserting what it alleges to be significant differences *among* these Census coarse paper grades,** the Commission proceeds to argue that there are similar differences *between* these Census coarse paper grades, on the one hand, and other trade coarse papers, on the other hand.

(ii) *The differences which exist among the Census coarse paper grades are the same as those which the Commission asserts exist between Census paperboards, Census tissue papers and Census special industrial papers, on the one hand, and the Census coarse paper grades, on the other hand:* The Commission states that the Census paperboards are used primarily to make paper boxes and cartons (Comm. Br. 105-108);† that the Census tissue papers are used for sanitary purposes and as a lightweight wrapping paper (Comm. Br. 115); and that the Census special industrial papers are used to make tabulating cards, tags and file folders (Comm. Br. 117).

* The Commission then argues that sulphite papers, generally, are "not competitive" with sulphate papers whenever strength is the decisive factor (Comm. Br. 102-103); yet, sulphite and sulphate (kraft) papers are both included in the Commission's Census coarse paper line of commerce (RX 62, pp. 38-42).

** The Commission *never* discusses the other Census coarse paper grades such as asphalted paper, cup stock, creping paper, glassine and greaseproof paper and "other converting" paper (RX 62, pp. 38-42).

† The only record reference given by the Commission for its assertion that "A basic product differentiation in the paper industry is between paper and paperboard" (Comm. Br. 105) is the testimony of its witness, Professor John A. Guthrie (R 2758), whose book, "Economics of Pulp and Paper", was stricken from the record by the Hearing Examiner because, *inter alia*, he "has not qualified under the present state of this record as an expert in this field" (R 2817-2818).

Thus, the Commission asserts, these papers are “positively non-competitive” with the Census coarse paper grades because they serve different end uses; it follows, the Commission argues, that they are in different lines of commerce (Comm. Br. 107-108, 115, 118).

These differences, however, are the same as the differences *among* the Census coarse paper grades: Bag paper is used to make bags; envelope paper is used to make envelopes; wrapping paper is used without further processing as a wrapping material; waxing paper is used to make waxed paper products; gumming paper is used to make gummed tape; etc. Thus, to track the Commission’s language (Comm. Br. 118), the many different Census coarse paper grades “do not compete with each other” and therefore cannot be part of the same line of commerce.

The Commission then points to differences in physical characteristics. It states that the Census paperboards, as a matter of “general observation”, are heavier than most Census coarse paper grades (Comm. Br. 108); that the Census tissue papers are lighter in weight (Comm. Br. 115-116); and that the Census special industrial papers are “specification” papers (Comm. Br. 117-118).

The Commission is again observing differences equally present among the Census coarse paper grades. Shipping sack paper is a “specification” paper (R 3783-3784 [Ticoulat]) and the various papers classified as Census coarse paper range in basis weight from 18# to 250#; this range includes the weights of some of the Census tissue papers (toweling is 32#), and of most of the Census paperboards (the most common weight of paperboard is 126#) (RX 42Z-3; RX 62, pp. 14-16; RX 92A, p. 7; R 2946-2947 [Hunt]).

The Commission then argues that various papers are sold in different “markets” in that paper and paperboard

are not usually purchased by the same customers (Comm. Br. 110-114).

The Commission is again forced to admit, however, that the same shoe fits the Census coarse paper grades. The different papers classified as Census coarse paper are not sold to the same customers: envelope manufacturers buy envelope paper (a Census coarse paper grade) and do not buy such other Census coarse paper grades as shipping sack paper and gumming paper; shipping sack manufacturers buy shipping sack paper (a Census coarse paper grade) and do not buy such other Census coarse paper grades as waxing paper, fly paper, soda straw paper and butcher paper; gummed tape manufacturers buy gumming paper (a Census coarse paper grade) and do not buy such other Census coarse paper grades as asphaltting paper, cup stock and creping paper; etc. (Comm. Br. 95-103; see also Pet. Br. 251, 257 and CX 117).*

The Commission's last argument is that:

"The 'demand and demand prices' for the coarse papers, 'Census' or 'trade,' do not all move together." (Comm. Br. 119)

and concludes that:

"the price movements and profit variations between the various papers, including the product-line papers [the Census coarse paper grades] and the paperboards are further evidence that these products are sold in response to different market demands." (Comm. Br. 123)

In addition to these statements, which by themselves destroy the Commission's attempt to isolate the Census

* Consistently, the Commission adopts the observation made in our main brief that "purchasers of Census coarse papers are in widely separated fields of business" (Comm. Br. 118, 119).

coarse paper grades as a product market, the evidence of price movements shows that the prices of wrapping paper, butcher paper and waxing paper (the only Census coarse paper grades discussed under prices) did not always move together (Comm. Br. 121-122; RX 103, p. 23), and the evidence of profit variations shows that the profit per day on the sale of Census coarse paper grades ranged from \$12,060 for unbleached wrapping paper to \$28,851 for unbleached gumming paper (Comm. Br. 126; RX 92A, p. 430).

(iii) *Conclusion*: Thus, on the Commission's concessions and admissions, on its own product market test, to wit, that

“end-use and the physical characteristics required therefor most reliably delineate the line of commerce or relevant market in which a specified paper is sold.” (Comm. Br. 105)

and on its assertion that papers which are sold to different purchasers at different prices “are not competitive with one another” and “are not part of a single line of commerce” (Comm. Br. 110, 127, 128), it is impossible to conclude that “Census coarse paper” is a rational and defensible line of commerce.

In view of the foregoing, it is not surprising that the Commission nowhere attempts to support its line of commerce finding. In one sub-heading in its brief, the Commission promises to support this finding:

“8. *The Commission's finding as to line of commerce is fully substantiated by the record.*” (Comm. Br. 127)

but the promise is never fulfilled. Under this sub-heading, instead of attempting to support its line of commerce finding by reference to substantial evidence, the Commission, driven compulsively by its own arguments, asserts that:

“Even some of the papers within the product line [the Census coarse paper grades] might have been

selected as separate lines of commerce.” (Comm. Br. 128)

pointing out that:

“ . . . converters do not buy wrapping paper and . . . therefore, wrapping paper is sold in a market different from that in which converting papers are sold.” (Comm. Br. 128n)*

It then argues that:

“ . . . the product-line papers [the Census coarse paper grades] have different end uses and therefore different characteristics.” (Comm. Br. 129)

that:

“ . . . there is *no* substitutability in use among ‘great many Census coarse papers.’ ” (Comm. Br. 130n)

that among the Census coarse paper grades, where strength is decisive, those made from kraft (sulphate) pulp are not competitive with those made from sulphite pulp (Comm. Br. 140) and, finally, that: “A buyer who needs shipping-sack paper ‘cannot make do’ with wrapping paper and vice-versa.” (Comm. Br. 199).

This is an astonishing argument. The Commission made no findings whatsoever respecting any such alleged lines of commerce. In fact, some of these very same alleged lines of commerce were proposed by Commission counsel below and rejected.

* On the basis of the Commission’s arguments in this Court, “wrapping paper” would constitute not one but several lines of commerce. The Census sub-sub-category “wrapping paper” includes grocery wraps, butcher paper (which has special blood-proofing qualities; R 2028 [Oberdorfer]; Comm. Br. 96) and specialty wrapping paper used for gift wrappings (RX 62, pp. 38-39, 41).

Commission counsel requested the Hearing Examiner to find that wrapping paper constituted a separate line of commerce, that kraft envelope paper constituted a separate line of commerce, and that kraft gumming paper, kraft waxing paper, kraft grocery bag paper and butcher paper each constituted a separate line of commerce (R 336-337).*

The Hearing Examiner, however, refused to make such findings and found instead that "Census coarse paper" (including not only kraft but sulphite papers) was the relevant line of commerce (R 589-590), and the Commission adopted the finding of the Hearing Examiner (R 605, 608-612).

The many fragmentary lines of commerce proposed by Commission counsel and rejected by the Hearing Examiner and the Commission cannot, of course, be resurrected here.

Furthermore, the Supreme Court unequivocally held in the *General Motors* case, *United States v. E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 595 (1957), that Section 7 requires that:

"The market affected must be substantial."

In an attempt to comply with this holding, the Commission in its opinion stated that the market it found—the alleged western market for *all* of the Census coarse paper grades—was a substantial market (R 613).

The Commission, however, does not even attempt to answer the demonstration in our main brief that its alleged western "Census coarse paper" market is *not substantial* (Pet. Br. 244-246); *General Motors* even more clearly forbids an order addressed to only fragments of an insubstantial market.

As demonstrated above, the Commission has conceded that "Census coarse paper" is not a line of commerce.

* Commission counsel never requested the Hearing Examiner to find that "Census coarse paper" constituted a line of commerce.

The Commission's diversionary attack on Crown's proposed trade coarse paper line of commerce, to which we now turn, was not as successful as the Commission's attack on its own line of commerce.

B. The Commission unsuccessfully challenges the proof that trade coarse paper is the relevant line of commerce.

The Commission attacks our demonstration that trade coarse papers are made from the same raw materials, in the same mills and on the same machines, and are sold in a single market (Comm. Br. 93-94). However, as demonstrated below, each of our claims is fully substantiated by the evidence.

1. Trade coarse papers are made from the same raw materials.

St. Helens had a single raw material which it used to make all of its papers, *i.e.*, kraft wood pulp (R 2006 [Oberdorfer]). From this raw material it made papers classified by the Census as Census coarse paper, Census sanitary tissue stock, Census tissue paper except sanitary and thin, Census container board, Census special industrial paper, Census bending board, and Census special paperboard stock, all of which are trade coarse papers (Pet. Br. 48-49).

St. Regis, at Tacoma, Washington, which also made its paper from kraft wood pulp (R 2615), produced not only papers classified as Census coarse paper, but other trade coarse papers such as Census container board, Census special industrial paper, Census bending board and Census special paperboard stock (Pet. Br. 161).

Western Kraft at Albany, Oregon and Longview Fibre at Longview, Washington produce Census coarse paper grades and Census paperboard grades from kraft (sulphate) wood pulp (Pet. Br. 161; R 1564 [Zellerbach], 1742 [Wollenberg]).

Publishers Paper at Oregon City, Oregon uses the contrasting sulphite process for converting wood into wood pulp, and uses its sulphite wood pulp to produce Census coarse papers, Census sanitary tissue and Census tissue paper except sanitary and thin (Pet. Br. 161; R 2245-2246, 2248).

Crown uses both kraft and sulphite wood pulp to produce its trade coarse papers (Pet. Br. 161; R 1521 [Zellerbach]; CX 4, p. 19 [1733]).

In short, wood pulp, whether made by the kraft or the sulphite process, is the basic raw material from which western mills produce not only the Census coarse paper grades but also the other grades of trade coarse paper.

The Commission argues in opposition that "the pulps differ for different papers" because of differences in refining and in the addition of sizing or dyes (Comm. Br. 93, 95-96, 99-100, 102-103, 110, 137-138).

This argument, however, cannot be seriously advanced because the Commission itself has made specific findings squarely to the contrary (R 567-572). The Commission has found that different strength or porosity characteristics can be obtained by variations in the beating or preparation of the pulp, that dyes can be added to produce a complete range of colored papers and that sizing can be added either in the stock solution or at a size press and, after a series of findings substantiating the flexibility of the paper production equipment, that:

"Only rarely is special equipment required for the production of any grade of trade coarse paper."
(R 571)

The Commission also argues that

"... even as between wood pulp, sulphite pulp is not competitive with sulphate (kraft) pulp where strength is a decisive factor" (Comm. Br. 140)

The fact that for some uses one type of wood pulp is preferred over the other does not separate kraft papers and sulphite papers into separate lines of commerce. If, however, papers made from kraft pulp are in a different line of commerce from papers made from sulphite pulp, the Commission's Census coarse paper line of commerce finding, which includes *both* kraft and sulphite papers (RX 62, pp. 38-42), would have to be rejected for that reason alone.

The Commission's last assertion is that a higher proportion of wood pulp goes into the manufacture of Census coarse paper grades than into the production of paperboard, while a higher proportion of other fibrous materials, principally waste materials, is commonly used in the production of some paperboards (Comm. Br. 109-110, 139-140). Again, the Commission ignores one of its own findings, to wit, that almost all of the trade coarse papers produced in the West (which includes paperboard) are made from wood pulp, and not from waste paper or other non-wood pulps (R 570).

2. Trade coarse papers are made in the same mills.

The Commission argues that trade coarse papers are not made in the same mills because

“there is marked specialization among mills in the particular papers which they produce.” (Comm. Br. 94, 136)

The Commission cites no evidence in the record to support this claim because none exists.

St. Helens made a wide variety of trade coarse papers in its one small mill, and this was typical of every mill for which there are facts in evidence. Not a single mill produces *only* the Census coarse paper grades which constitute the Commission's line of commerce. (Pet. Br. 161-162)

3. Trade coarse papers are made on the same machines.

The main thrust of the Commission's attack is centered here. It claims that (i) the flexibility of the Fourdrinier machine, permitting a mill owner to change grades "at the flip of a lever", is a "deliberately misconceived assumption" of ours (Comm. Br. 188)*, (ii) paper machines produce limited, specialized lines of paper and, therefore, our claim that a mill owner will change his pattern of production in response to changes in the relative profitability of producing different grades of paper is also a "deliberately misconceived assumption" (Comm. Br. 94, 188), and (iii) in any event, machine flexibility is an irrelevant consideration in a Section 7 case (Comm. Br. 133-135). Each of these assertions is wholly without merit.

(i) *The flexibility of the Fourdrinier paper machine is not an issue in this Court; it was proved at the hearing and found as a fact by the Commission:* The Hearing Examiner made detailed and extensive findings in which the proved flexibility of the Fourdrinier paper machine was expressly found (Pet. Br. 51-55; R 567-572) and, in his Conclusion 19, he stated that the "flexibility of these machines is recognized" (R 595).

On appeal, the Commission adopted these findings and this conclusion of the Hearing Examiner (R 605).

In total disregard of its own findings, the Commission now calls the fact of flexibility a "deliberately misconceived assumption" of ours (Comm. Br. 188). It asserts that Mr.

* The phrase, "at the flip of a lever", is the Commission's and not ours. What we stated was that only simple adjustments of the production equipment (not only of the machine as the Commission claims in its footnote on page 196) are necessary to obtain the different characteristics of the various grades of trade coarse papers, and that it is not even necessary to stop the machine in order to make such changes (Pet. Br. 186). This statement is fully proved in the record (R 3631-3651).

John E. Goodwillie, the expert witness upon whose testimony its own findings of flexibility are primarily based, was not qualified to give his expert testimony because his company only manufactures machines and is not a producer of paper (Comm. Br. 193n).^{*} We submit that no one reading Mr. Goodwillie's testimony could doubt his qualifications (R 3508 *et seq.*).^{**}

The flexibility of the paper machine destroys the Commission's Census coarse paper line of commerce; it is the unifying competitive factor which proves that the line of commerce is trade coarse paper and not the narrow range of papers included in the artificial "Census coarse paper" statistical classification (Pet. Br. 158-169, 180-187).

With respect to our contention that trade coarse papers are made on the same machines, and the Commission's belated claim in this Court to the contrary, we refer the Court to the following finding of the Commission:

"53. All 81 Fourdrinier machines in the West now producing paper and paperboard can make 40-pound paper, and 58 of them can also make 126-pound paper. Only rarely is special equipment required for the production of any grade of trade coarse paper. A size press is desirable for certain grades, and most modern machines in the West have a size press; when they do not, the size can be added

^{*} Mr. Goodwillie is vice president of Beloit Iron Works, which is probably the largest paper machine manufacturer in the country (R 3508, 3511).

^{**} In this connection, the Commission also charges that Crown "abstained from calling the man who makes the paper, presumably for reasons known best to [it]." (Comm. Br. 198). The charge is belied by the record. Crown called as a witness Mr. Reed O. Hunt, then the vice president of Crown in charge of production, *i.e.*, the making of paper (R 2940-3031). Mr. Hunt also testified as a Commission witness (R 1784-1853).

to the pulp before it reaches the machine headbox.”
(R 571-572; see also Pet. Br. 51-55, 162-163)

(ii) *Paper machines do not produce limited, specialized lines of paper and it is economically practical for a mill owner to change the pattern of his production:* St. Helens, on its two machines, alternately produced Census coarse paper grades and papers falling in several other Census statistical subcategories of trade coarse paper (Pet. Br. 47-48, 162).

St. Regis, on its single paper machine at Tacoma, Washington, produced not only Census coarse paper grades but also other trade coarse papers such as linerboard, corrugating medium, cup lid stock, food container stock, tag stock, absorbent paper, special coating board and can stock (R 2616-2618).

Western Kraft, at Albany, Oregon, produces bag paper (a Census coarse paper grade) and linerboard (a trade but not a Census coarse paper grade) on its one Fourdrinier machine (RX 95 [5119]), as does Weyerhaeuser on its No. 3 machine at Longview, Washington (R 2625-2626).

Similarly, Longview's No. 5 machine and its new No. 7 machine at Longview, Washington, are “dual purpose machines and they might be by our [Longview's] choice used either for [Census] coarse paper or paperboard [a trade but not Census coarse paper grade]” (R 1744, 1766 [Wollenberg]; see also RX 87, pp. 43-44; R 2130, 2133, 2249-2250, 2596-2598, 2607-2608, 2910-2911, 2914-2915 and 3286-3290, 3346-3350 [Pier]).

Further evidence that paper machines do not produce limited grades of paper is the fact that it is almost as common for a Fourdrinier machine to produce both paper and paperboard in any given week (*i.e.*, what is known as a “fluctuating” Fourdrinier) as it is for the machine to

produce paper exclusively or paperboard exclusively (RX 87, pp. 18-19, 43-44; R 3286-3291, 3346, 3350 [Pier]).*

With respect to the question whether it is economically practical for a mill to change the pattern of its production, the Commission asserts that:

“ . . . the mill owner will [not] *promptly* change his pattern of production with changes in the relative profitability of producing different grades of paper.” (Comm. Br. 188; italics added)

To support this assertion, the Commission first cites the testimony of Mr. Wollenberg, Longview's President, that he “wouldn't necessarily go into a more profitable development if it broke up the line tha[t] we need to serve, and which would be a short time profit against a long term policy” (Comm. Br. 189).

The Commission does not refer, however, to the Longview Annual Report (CX 76 [3043]), in which Mr. Wollenberg states that Longview leaves two of its machines flexible to produce paper or container board “as sales opportunities demand”. Nor does the Commission refer to the testimony of Mr. Wollenberg immediately following the part it quotes, in which Mr. Wollenberg states that he would have no hesitancy in adding additional bleaching capacity if he saw a long term trend toward the bleached papers (R 1770).

Similarly, the Commission, in quoting the testimony of Mr. Robinson of Publishers Paper Company (Comm. Br. 190), omits his testimony that since his machines are flex-

* Of the 45 fluctuating Fourdrinier machines for which week-by-week production data are set forth in the evidence cited above, 11 are located in the West (including St. Helens' No. 1 machine); nine are classified as fluctuating regularly between paper and paperboard and two are classified as fluctuating only casually (R 3286-3291, 3346, 3350 [Pier]).

ible, he could run wrapping paper instead of newsprint if wrapping paper became more desirable (R 2250).

Likewise, the Commission fails to refer to all of the testimony given on behalf of Columbia River of Vancouver, Washington and Salem, Oregon (Comm. Br. 190), particularly that part of the testimony which discloses that Columbia River, if it thought it desirable, could change the products presently produced by its machines to others which its machines could produce (R 2133).

The Commission incorrectly limits its consideration to the alleged immediate short run consequences of temporary market conditions. A mill may be unwilling to discontinue its present grades of paper and its present customers for a temporary advantage arising from the fact that one grade of paper is temporarily more profitable than another but, as the testimony in the record but not quoted by the Commission shows, a mill will change its pattern of production for a long run advantage (*e.g.*, CX 76 [3043]; R 2133, 2250).

A Clayton Act order cannot be based solely upon the short term inertia of sellers or buyers; it must be based on long run probabilities. This was squarely held in *American Crystal Sugar*:

“We hold that only an acquisition which *in the long run* may reasonably be expected to substantially lessen competition within a relevant market, would violate §7 as amended.” (259 F. 2d, at 527; italics added)

Thus, *American Crystal Sugar* makes completely irrelevant the Commission’s assertion that a paper mill will not “promptly” shift its production from one grade of trade coarse paper to another, where the evidence is conclusive, as it is here, that shifting is not only feasible but customary in the industry.

The Commission also suggests that paper machines are built with narrow optimum basis weight ranges and that therefore they can be operated economically only within that narrow range (Comm. Br. 196-198). To support this claim the Commission cites selected bits of testimony. The testimony not cited, however, dispels the Commission's misleading implication. For example, the very next question and answer following the quoted testimony of Mr. Goodwillie (Comm. Br. 196-197) is:

“Q. Well, are not paper machines designed to have optimum range for the products that the operators want to produce? A. I think I should answer that question no, and go on with the explanation that in the ordinary course of events a paper mill would want to have built into their machine the maximum degree of flexibility that could be incorporated within limits where extending the range or extending the flexibility would be done at no increase in cost. . . .” (R 3732)*

(iii) *The flexibility of paper producing equipment is a highly relevant consideration in a Section 7 case:* The Commission's main argument against defining the line of commerce in terms of the products which a typical paper mill can alternatively, and as easily, produce is that such a definition is based upon the decision of the Supreme Court in *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948), which decision, the Commission claims, was repudiated by the Congress when it amended Section 7 in 1950.

The Commission cites as authority a dictum in *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738, 741 (2d Cir. 1953), that “we believe the amendment of Section 7 in 1950 certainly casts doubt” on *Columbia Steel* (Comm. Br.

* See also, the *full* statement in RX 92A, pp. 393-394, instead of just the part quoted by the Commission (Comm. Br. 198).

26),* and a dictum in a footnote in *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S. D. N. Y. 1958), that the definition of the product market on the basis of production flexibility is not controlling in a horizontal merger case under Section 7 of the Clayton Act (Comm. Br. 133-135).

The legislative history of Section 7, as amended, (parts of which are referred to at Comm. Br. 24-25) merely points out that the *ultimate conclusion* of *Columbia Steel* might be different today, because an action today would be under Section 7 of the Clayton Act where the Government has to prove only that the acquisition "may tend" substantially to lessen competition, rather than under Sections 1 or 2 of the Sherman Act, which require proof of an actual restraint of trade or monopoly.

Nothing in the legislative history, however, casts the slightest doubt on the holding of *Columbia Steel* with respect to *market definition*.

The dictum in one of the footnotes in *Bethlehem Steel* is of no aid to the Commission because the *holding* in *Bethlehem Steel* is consistent only with a trade coarse paper line of commerce.

Judge Weinfeld found that hot rolled steel, cold rolled steel, hot rolled bars, track spikes, tin plate, butt weld pipe, electric weld pipe and seamless pipe each represented a separate line of commerce (168 F. Supp., at 618-619). The

* It should be noted that that Court thought doubt had also been cast on *International Shoe Co. v. FTC*, 280 U. S. 291 (1930). Not only is the legislative history of Section 7, as amended, expressly to the contrary (Pet. Br. 242-243, 278), but the *International Shoe* doctrine was recently applied in *United States v. Maryland & Va. Milk Producers Ass'n, Inc.*, 167 F. Supp. 799, 808-809 (D. D. C. 1958), probable jurisdiction noted, 28 U. S. L. Week 3002 (No. 62). The Department of Justice also is of the opinion that *International Shoe* applies to the amended Section 7 (Pet. Br. 279).

significant fact for purposes of our case is that *each* of these lines of commerce included *all of the products which could be made on the same production equipment, irrespective of thickness, specifications, uses or prices.*

Thus, for example, Judge Weinfeld found that hot rolled bars, which are made in a bar mill, was a line of commerce even though hot rolled bars came in

“various sizes, shapes and forms, including rounds, ovals, hexagons, octagons, flats, squares, round cornered squares and special non-standard bar sections and also structural angles, channels, tees and other light structural shapes.” (Finding 181)

Likewise, he found that seamless pipe was “produced on a different type of mill and by an entirely different process than that used for the production of other steel tubular products” and that it was a single line of commerce although seamless pipe ranges in size from a hypodermic needle to about 22 inches in diameter (Pet. Br. 158n).

Trade coarse paper is comparable to hot rolled bars, seamless pipe, etc.; it too represents products which can be interchangeably made on the same production equipment. In both instances, the common, unifying element for *inclusion* of products in the same market is the flexibility of the production equipment, *i.e.*, the ability to produce a variety of products on the same production equipment.

Furthermore, Judge Weinfeld’s dictum respecting *Columbia Steel*, that he thinks the standard for determining the product market might be different under Section 7 than under the Sherman Act (Comm. Br. 134-135), is squarely contradicted by the holding in *American Crystal Sugar*. In *American Crystal Sugar*, a Clayton Act Section 7 case, the Second Circuit (295 F. 2d, at 529) expressly followed the approach to market definition employed by the Supreme

Court in *Cellophane*, a Sherman Act case.* Thus, the standard for determining the product market is the same under the Sherman Act as it is under the Clayton Act.

The two statutes may yield different results because one (the Sherman Act) requires proof of a restraint of trade or monopoly, whereas the other (Section 7) is satisfied by proof that there may be a substantial lessening of competition, but the differences in these standards are irrelevant in determining the market to which the complaint, under either statute, must be addressed.

4. Trade coarse papers are sold in the same market.

In our main brief, we demonstrated that, although the specific grades of trade coarse paper might differ from one another in weight, thickness, color, finish and other physical characteristics, these variations are easily obtainable by simple adjustments of the manufacturer's paper production equipment and that, therefore, from the point of view of the paper purchaser (including the purchaser of Census coarse paper grades), the supply side of the market is represented by all the mills which supply trade coarse papers (Pet. Br. 182-187, 191-192). Consistently, the record discloses that *no* mill produces or sells only Census coarse paper grades (see Pet. Br. 160-163).

The purchasers of the various papers classified as Census coarse paper, as well as the purchasers of the other trade coarse papers, constitute the demand side of the market because they all compete for the output of the same mills.

* *United States v. E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956). This holding in *American Crystal Sugar* should be compared with the Commission's claim in this Court that the *Cellophane* market approach, like the *Columbia Steel* market approach, is inapplicable in a Section 7 case (Comm. Br. 130-133).

Thus, the same logic that led the Courts in *Columbia Steel* and *Bethlehem Steel* to include in a single line of commerce all products interchangeably made on the same equipment, compels the conclusion that trade coarse paper is sold in a single market.

The unifying factor is that the suppliers of the Census coarse paper grades are also the suppliers of the other trade coarse papers and that therefore the supply, demand and demand price for each of these grades of papers is directly influenced by the supply, demand and demand price for each of the others (Pet. Br. 165-169, 191-192, 207-208).*

Consistently, Mr. Beggs of the Stanford Research Institute, an expert witness for Crown, testified that the market in which papers classified as Census coarse paper are sold

* The Commission challenges the fact that the price and supply of the various trade coarse papers are very closely linked together, pointing out (i) that for four specific grades of paper and three specific grades of paperboard there has been less than completely parallel price movement and (ii) that paper prices are determined by competition rather than on the cost of production (Comm. Br. 118-127).

The Commission misses the point entirely: The fact that prices for the different trade coarse papers are based upon market competition rather than on production costs indicates the inter-relationship of the demands for different grades of paper. If each separate grade of paper were sold in a separate market, uninfluenced by the demand and demand price for any other grade of paper, then alone would it be expected that prices would be based on cost of production without reference to competition.

Furthermore, the statistics not cited by the Commission destroy its conclusion. The wholesale price index numbers for *all* paper (except newsprint) and *all* paperboard, as distinguished from the ones for the particular grades of paper and paperboard cited by the Commission, disclose that the price indexes for the two groups moved in general together and finished the eight-year period with about equal advances in price (RX 103, p. 23 [5195]).

must also include the other trade coarse papers, *i.e.*, Census container board, Census tissue papers, Census special industrial paper, etc. Dr. Barnes, the Commission's economist, testified that competition in the sale of Census coarse papers could not be analyzed without taking into account the other trade coarse papers.* (Pet. Br. 166-169, 207-208; RX 92A, pp. 36-37, 471-472; R 1178-1179 [Barnes], 4115-4116 [Beggs], 5219 [Barnes])

Two final observations on the market where trade coarse papers are sold: In its opinion below, the Commission asserted that the Census coarse paper grades represent a market for flexible packaging materials (R 610). In our main brief, however, we demonstrated that the market for "flexible packaging materials" cannot be confined to the Census coarse paper grades (Pet. Br. 189-191). The Commission's silence with respect to its "flexible packaging materials" argument is the best evidence that it has now abandoned one of the only two crutches it relied on to support its assertion that "markets . . . tend to distinguish [Census coarse] papers" (Pet. Br. 187).

Lastly, we note how the Commission misstates the thrust of our contention that uses do not distinguish papers within the Census coarse paper classification from other trade coarse papers.

The Commission accuses us of engaging in "tactics" directed to making this Court believe that papers which are *classified* for particular uses are actually used for other purposes (Comm. Br. 96-97, 100, 106, 133). Although we noted in one paragraph a few instances where paper *classified* for a particular use was actually used for a different purpose (Pet. Br. 199-200), the point we were making, which the Commission never answers, is that it is economically unrealistic to attempt to distinguish papers on the

* The reason given by the Commission's economist was that these papers are "closely related on the supply side" (R 5219).

basis of use, because the same paper can be used for many different purposes (Pet. Br. 197-201).

For example, if a customer wants paper to make shipping cartons, he asks his mill for paper to make shipping cartons. *Only the fact that the paper is used to make shipping cartons makes it a "Census container board" grade*, because the Census grade classification is based on use and not on the physical characteristics of the paper. If *the same paper were used to manufacture shipping sacks, that use would make it a "Census coarse paper" grade* according to the Census classification. (Pet. Br. 198)

The identical point is made in *The Dictionary of Paper* (1951 ed.), p. 2:

"... there is the possibility of describing a paper in terms of its use. For example, a Multigraph paper might be defined as a paper which is used in the Multigraph process; butchers wrap as a paper which is used for wrapping meat. There is nothing particularly revealing, however, in this sort of definition. Generally, it may be expected to leave the reader utterly confused, as it is possible for a given kind of paper to qualify for an unpredictable number of uses. In addition to their ineffectuality, therefore, descriptions based solely on use are bound to be incomplete as well as dated."

C. Conclusion—The Commission has confessed error in its Census coarse paper line of commerce finding.

The Commission's dilemma on this appeal is that it cannot exploit the differences in physical characteristics, uses and prices between the Census coarse paper grades on the one hand, and the other trade coarse papers on the other hand, without destroying its finding that the Census coarse paper grades constitute a rational line of commerce. The dilemma arises because the differences *between* papers

classified as Census coarse paper, on the one hand, and papers classified as Census container board, Census tissue paper, Census special industrial paper, etc., on the other hand, are the same as those which exist *among* the Census coarse paper grades.

The unifying factor among the papers classified as Census coarse paper—that they are made from the same raw materials, in the same mills and on the same machines, and are sold in the same market—requires inclusion in a single line of commerce of *all* the trade coarse papers, as contended by Petitioner and proved by the substantial evidence in the record.

Thus, the Commission's crucial "Census coarse paper" line of commerce finding is not only not supported by substantial evidence on the whole record in accordance with the requirements of Section 11 of the Clayton Act, as amended, and Sections 7(c) and 10(e) of the Administrative Procedure Act, but is contrary to the evidence. The Commission's order, therefore, must be reversed.

POINT II

The Commission has failed to support its finding that the 11 western states constitute the relevant section of the country.

We pointed out in our main brief that the Commission relied on irrelevant and incorrect statistics to support its finding that the 11 western states constitute the appropriate geographic market area ("section of the country"), that the Commission completely ignored the actual sales patterns of Crown and St. Helens, and that the Commission relied upon its unsupported assertion that only "insignificant" quantities of Census coarse paper grades were sold in the West by eastern and southern paper mills (Pet. Br. 24-30, 208-232).

The Commission's answering brief does not deny that its statistics were irrelevant and incorrect*, continues to ignore the actual sales patterns of Crown and St. Helens, and offers no factual support for its claim that only "insignificant" quantities of paper were sold in the West by eastern and southern mills (Comm. Br. 36-37, 140-174).

A. The pattern of sales of Crown and St. Helens precludes a geographic market limited to the 11 western states.

The Commission is silent on the demonstration in our main brief that its choice of the 11 western states as the

* The Commission does not deny that it was incorrect in stating in its opinion that Crown sold 77% of its wrapping paper in the West (it was only 56%) and in referring in its opinion to where Crown sold some of its trade coarse papers, instead of limiting its discussion to Crown's sales of the narrowly-defined Census coarse paper grades (Pet. Br. 26-27).

The Commission also stated below that 85% of St. Helens' domestic sales of Census coarse paper grades were made in the West (R 612). The Commission's brief restates this figure at 81.5% (Comm. Br. 145). The Commission's new figure of 81.5% is still too high (cf. Pet. Br. 25, 210-211). The Commission refers to the testimony of Mr. Oberdorfer, St. Helens' former president, that a paper called "natural converting kraft" is "used primarily in the manufacture of can containers for empty tin cans" (R 2044). This testimony does not prove, as the Commission claims, that a paper called "Canco converting" is one of the converting papers classified as Census coarse paper (Comm. Br. 146n). Furthermore, the Commission's assertion that St. Helens sold 469 tons of "asphalting paper" (Comm. Br. table facing p. 145), a Census coarse paper grade, is made in the face of the fact that the St. Helens' sales analysis discloses no sales of "asphalting paper" and St. Helens' production records indicate that it produced no asphalting paper (CX 117; CX 168A [4049]).

The Commission's assertion that 85.2% of Crown's domestic sales of Census coarse paper grades were made in the West depends on the Commission's including as sales approximately 32,000 tons of intra-corporate transfers between Crown's paper mills and its converting plants, and approximately 10,000 tons of sales to a wholly-owned subsidiary (Comm. Br. 144, 169).

geographic area of effective competition was precluded by the actual pattern of sales by Crown and St. Helens (Pet. Br. 210-214). Instead, the Commission talks exclusively about where these companies sold "the bulk" of their Census coarse paper grades (Comm. Br. 34, 36, 141, 149).*

"The bulk" of St. Helens' sales of papers classified as Census coarse paper was made in the 11 western states, but it is equally true that "the bulk" of St. Helens' sales was made in California, Washington, Oregon, Texas, Colorado and Missouri (an aggregate of 27,480 tons for those six states, as opposed to 26,709 tons for the 11 western states) (Pet. Br. 210-211; CX 117). Texas and Missouri are not in the 11 western states as defined by the Commission.

* The Commission seeks to convey the incorrect impression that its "bulk" sales theory is supported by *American Crystal Sugar Co. v. The Cuban-American Sugar Co.*, 152 F. Supp. 387 (S. D. N. Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958) (Comm. Br. 143, 149, 167n). In that case, the Court found that a certain 10-state area was the relevant section of the country because that was a "price-conscious industrial sugar market" in which the parties were "prime forces" and in especially active competition, and because it was a market "subject to common economic forces" (259 F. 2d, at 527-529). The "common economic forces", and the factor which segregated that area from the rest of the country and made it an "area of effective competition", was not the fact that the parties made a given percentage of their sales there, but the fact that the sales price of the relevant product was lower in that 10-state area than in any other part of the country (152 F. Supp., at 391). That is not the situation in our case; the undisputed fact is that trade coarse papers (including Census coarse papers), no matter where produced, sell at uniform prices throughout the United States, except for upcharges—by eastern and western producers alike—for some grades in the more sparsely populated areas of Montana, Idaho, Nevada, Utah and Arizona (R 1483-1487 and 1671-1679, 1682 [Ticoulat], 2543 [Long]; RX 70-74 [4910-4917]). (The Commission's statement that "As Crown went East its prices increased in some areas" (Comm. Br. 150n) relates only to the upcharges in those five intermountain states.)

The Commission's "bulk" argument cannot justify including the five "western" states of Nevada, Wyoming, New Mexico, Idaho and Montana, where St. Helens' aggregate sales were only 270 tons, and excluding the non-"western" states of Texas, Missouri, Minnesota, Louisiana and Oklahoma, where St. Helens' aggregate sales were 2,816 tons (Pet. Br. 211-212; CX 117).

"The bulk" of Crown's sales of Census coarse paper grades was made in California, Texas and Washington, which three states accounted for 53,326 tons of Crown's total of 70,687 tons of domestic sales of Census coarse paper grades (Pet. Br. 212-213; CX 36A-Z18 [2276-2318]).*

Thus, the Commission's "bulk" argument does not supply the substantial evidence needed to support its finding that the 11 western states are the relevant section of the country within the meaning of Section 7, particularly as St. Helens' and Crown's general pattern of sales indicates a market comprising the 22 states west of the Mississippi River (Pet. Br. 210-214; CX 36A-Z18 [2276-2318]; CX 117).

B. The Commission's geographic market cannot be supported by its unproved and unsupportable assertion that sales in the 11 western states by producers outside that area were "insignificant".

The Commission states, and reiterates throughout its brief, that shipments of Census coarse paper grades into the 11 western states from other parts of the country were insignificant (Comm. Br. 42-43, 58, 149-166). The Commis-

* The Commission incorrectly states that we went outside the record in arriving at the figure we use for Crown's western sales of shipping sack paper (Comm. Br. 144). We designated as shipping sack paper Crown's sales of bag paper which were reported in the Crown sales analysis (CX 36 [2276 *et seq.*]) as having been made to western shipping sack converters (Ames, Harris & Neville, Fulton, St. Regis and Bemis; R 1661). Evidently, these sales are shipping sack paper (a shipping sack is a "bag" in common parlance) and not "bag paper" as defined by the Census.

sion does not, however, support this assertion by reference to substantial evidence in the record.

There is no evidence as to where customers in eight of the 11 western states (the eight Mountain states) buy their Census coarse paper grades, and the Commission does not deny this.

There is no evidence as to where western wholesale grocers, chain stores, co-operatives and consumers buy their Census coarse paper grades, and the Commission does not claim that there is.

There is hardly any evidence with respect to where western converters, who buy 80% of the Census coarse paper grades (*i.e.*, all Census coarse paper grades other than wrapping paper; see RX 62, pp. 10-11), buy their Census coarse paper grades, and the Commission does not claim otherwise.

The Commission's principal evidence relates only to wrapping paper and particularly to the purchases of wrapping paper by a few jobbers in the three Pacific Coast states (*e.g.*, Comm. Br. 152-156), but even this evidence does not support the Commission's conclusion that shipments of Census coarse paper grades into the West were "insignificant" (Pet. App. 19-36; Pet. Br. 220-225).

Thus, for example, under the heading "The freight advantage" (Comm. Br. 149-156), the Commission refers only to freight rates on shipments of wrapping paper, but significantly draws its conclusion with respect to *all* Census coarse paper grades (Comm. Br. 149-151). Even with respect to wrapping paper, however, the Commission ignores the fact that western mills do not have a freight advantage in supplying all of the 11 western states and that Crown and St. Helens absorbed freight on shipments to Texas and up to the Mississippi River, the cost of which would permit eastern and southern mills to ship anywhere in the West (Pet. Br. 225-227; RX 66A [4901]; RX 69B [4908]; R 3781-3782, 3800-3801 [Ticoulat]).

Under the heading "Shipping time, dependable source of supply and full coarse paper product line" (Comm. Br. 156-166), the Commission relies basically on the testimony of three Pacific Coast paper jobbers (*i.e.*, purchasers of wrapping paper; Pet. Br. 248, 251). The Commission does not claim, however, that western mills have a shipping time advantage, even on wrapping paper, to states like Colorado, Arizona and New Mexico, or that there is any evidence that eastern and southern mills would be less dependable sources of supply or offer a less "full" product line in those states.

Moreover, the Commission ignores the evidence that at least 64 non-western producers of paper sell in the West (despite freight and other supposed handicaps), that at least 25 of them sell Census coarse paper grades in the West, and that the national pattern of paper prices is inconsistent with an isolated western market (Pet. Br. 217-219, 227-228).

Even with respect to wrapping paper, there is evidence in the record of large and important shipments into the West. An I. C. C. waybill analysis indicates shipments of wrapping paper into the West by southern and eastern producers substantially in excess of St. Helens' sales of wrapping paper in the West (Pet. Br. 215-217; CX 85A-C [3079-3081]; RX 84A [5018]).

This I. C. C. waybill analysis also discloses very substantial shipments of other papers into the West, although the record does not permit a breakdown of these sales between Census coarse paper grades and other grades of paper (Pet. Br. 216; RX 84A-B[5018-5019]). This evidence is sufficient, however, to prove conclusively that the West is not an isolated market dependent upon western producers.*

* The Commission relies heavily on this I. C. C. waybill analysis to support its findings (Comm. Br. 163-164, 168). However, it seeks to discredit the analysis where it proves substantial shipments by eastern and southern mills into the West (Comm. Br. 165, 185n). The I. C. C. waybill analysis was put in evi-

C. There is a complete lack of evidence as to purchases in the eight Mountain states.

We pointed out in our main brief that any conclusion with respect to where purchasers of Census coarse paper grades in the eight Mountain states bought their paper could be based only on the biased and discredited survey which the Commission directed to be admitted in evidence and which the Commission now claims not to have relied upon (Pet. Br. 146-147, 228-229; Pet. App. 19-36). The Commission does not contest this showing and offers no reference to any other evidence which could support a finding with respect to these eight states.*

There is no substantial evidence on the whole record to support the Commission's finding that the 11 western states constitute the relevant geographic area of effective competition, *i.e.*, "section of the country".

dence by the Commission (R 1971, 1988-1989) and, even though the I. C. C. tonnage figures appear not to be precisely comparable to other figures in the record, the analysis indicates an order of magnitude which fully supports the conclusion of very substantial shipments by eastern and southern mills into the 11 western states.

* Challenged to point to evidence from *purchasers* in the eight Mountain states, the Commission refers only to (Comm. Br. 171-173): Hudson's western *selling* agent who *sold* only in California and a "little" in Nevada (R 2886); St. Helens' *selling* agent, Graham Paper Company, which *sold* basically in only seven of the 11 western states (R 2529 [Long]); Cupples Company, a *selling* agent for Publisher's and Crown, which *sold* in only nine of the 11 western states (R 1487-1488); Blake, Moffitt & Towne, Longview's principal jobbing outlet, which conducted business principally in the Pacific Coast states and had branches in three of the eight Mountain states (CX 67 [2997]); and Zellerbach Paper Company, Crown's jobber subsidiary, which conducted business principally in the Pacific Coast states and had branches in five of the eight Mountain states (CX 35 [2274]).

POINT III

The Commission cannot support, by substantial evidence on the whole record, its finding that the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the sale of "Census coarse papers" in the 11 western states.

The Commission discusses "competition" solely in terms of the *production* of Census coarse paper grades in Oregon, Washington and Idaho; any reference to the *sales* of Census coarse paper grades in the West by western and non-western producers is studiously avoided. Yet, even the Commission must concede that the concept of competition is concerned with the *purchase and sale* of papers and not only with their production.*

The reason the Commission discusses only production and ignores sales is perfectly clear: While Crown and St. Helens produced 280,251 tons of Census coarse paper grades in 1952, they *sold* only 81,868 tons in the West (Pet. Br. 33; CX 36A-Z18 [2276-2318]; CX 117; CX 168A [4049]), and large and important quantities of the Census coarse paper grades which were purchased by customers in the 11 western states were supplied by non-western producers (Pet. Br. 214-219).

The Commission's discussion of competition is further limited to only a few customers, to less than all of the grades of paper classified as Census coarse paper, and to only three of the 11 western states. Thus, the scope of its argumentation on competition is much narrower than the scope of its "market". In an attempt to hide this fact, the Commission discusses the alleged effects on competition (Point I of its brief) prior to and without reference to its

* If it were otherwise, the geographic "area of effective competition" would be Oregon, Washington and Idaho, where the paper is produced, and not the 11 western states.

discussion of the relevant market (Points II and III of its brief).

The Commission has in addition completely ignored the evidence in the record of the dynamic nature of the paper industry. The Commission does not deny that the paper industry in the West is one of continuing phenomenal growth, with vast supplies of pulpwood (the principal raw material for the manufacture of paper), great opportunity for new entry and expansion, and a concomitant continuing decline in concentration (Pet. Br. 58-69, 264-272).

Nor has the Commission successfully rebutted the evidence that the paper industry adjusts flexibly to meet changing market demands, that the number of competitors in the market increases each year, that St. Helens had planned largely to abandon its production and sale of Census coarse paper grades and that St. Helens was an ineffective competitor whose prospect of rehabilitation was remote (Pet. Br. 81-114, 266-281).

The Commission takes no cognizance whatsoever of the holding in *American Crystal Sugar* that:

“ . . . only an acquisition which *in the long run* may reasonably be expected to substantially lessen competition within a relevant market, will violate §7 as amended.” (259 Fed. 2d, at 527; italics added)

- A. The Commission does not meet the issue whether the market it found is a substantial market. (See the holding of the Supreme Court in *General Motors* that Section 7 requires that “The market affected must be substantial” (353 U. S., at 595).)

We demonstrated in our main brief that the Commission’s assumed western market for papers classified as Census coarse paper is not a substantial market (Pet. Br. 244-246). The Commission’s answer is silence.

In its opinion below, the Commission stated that its western Census coarse paper "market" was a substantial market because 437,384 tons of Census coarse paper grades were *produced* in the West in 1953 (R 613). In answer, we pointed out that western *sales* by western mills amounted to only 182,059 tons (Pet. Br. 244-245).^{*} Even adding the approximately 71,000 tons of Census coarse paper grades shipped into the West by southern and eastern producers (see p. 46n, *infra*), which the Commission steadfastly ignores, the Commission's order must be reversed because its conclusion of substantiality was based on a figure (437,384 tons) which was inflated over the evidence in the record by about 73%.

B. The Commission, confining itself to local production statistics, does not answer the statutory question whether there may be a substantial lessening of "competition".

In an attempt to excuse its reliance on production statistics, the Commission makes the mystifying statement that sales figures

" . . . obfuscates the real position of [Crown and St. Helens] as suppliers [*i.e.*, sellers] because Crown converted so much of its primary paper production and sold it in converted form." (Comm. Br. 56)

The Commission, however, arbitrarily excluded from its "Census coarse paper" line of commerce the products into which the papers in the Census coarse paper classification are converted (Pet. Br. 45-46; RX 62, pp. 38-42) and therefore it is *because* Crown, St. Helens and other western producers converted portions of their Census coarse paper grades into non-Census coarse paper converted products,

^{*} The Commission asserts that this is a "contrived estimated sales figure" (Comm. Br. 184-185), but it does not attempt to prove its assertion by reference to evidence in the record. Our estimate is fully substantiated by the record references in our main brief (pp. 244-245).

that *only* sales statistics disclose their "real position . . . as suppliers" of the arbitrarily selected Census coarse paper grades.

Furthermore, Crown and St. Helens, and other western Census coarse paper producers, sold additional portions of their paper *outside* the West, while eastern and southern mills were selling *into* the West (Pet. Br. 210-219).

Thus, any discussion which is limited to *local production* statistics necessarily produces a badly distorted picture of *competition* in the West. This can be graphically demonstrated by comparing the Commission's production figures with the evidence respecting sales.

1. The Commission improperly relies solely on production statistics to arrive at its share of the market and concentration percentages; the percentages disclosed by the sales statistics are very different and much lower.

The Commission recites that Crown and St. Helens together *produced* 62.5% of the Census coarse paper grades produced in the West and "that this clearly constituted a predominant share of the market" (Comm. Br. 44). Local production shares cannot, however, be equated with market shares, *i.e.*, sales; Crown and St. Helens *together* had a *maximum* share of the western market (*i.e.*, sales) of only 39% (Pet. Br. 246-247).*

* The Commission claims that our 39% figure is "completely misleading" because it includes 28,940 tons of wrapping paper imports (Comm. Br. 185n). *Although this figure is taken from a Commission exhibit*, the Commission now claims that it is too high (Comm. Br. 185; see also p. 41n, *supra*). On the contrary, the figure is too low because it does not include an unknown but large quantity of other shipments of Census coarse paper grades into the West by southern and eastern producers; total shipments into the West of all the papers classified as Census coarse paper must have far exceeded 28,940 tons. The evidence contains an estimate of consumption of Census coarse paper

The Commission next states that four companies accounted for 417,851 tons of western production of Census coarse paper grades out of total western production of 443,152 tons (Comm. Br. 44).

The Commission ignores the fact that these four companies accounted for only approximately 156,758 tons of *sales* of Census coarse paper grades in the 11 western states out of *minimum* total sales of approximately 210,999 tons (Pet. Br. 245-247). Thus, these four companies did not have a 94.3% share of the market as the Commission asserts, but less than 74%.

That production statistics are misleading is made even clearer when we examine the Commission's assertions respecting specific grades of paper classified as Census coarse paper.

2. Wrapping Paper

The Commission alleges that the acquisition gave Crown "a virtual monopoly in the supply of wrapping paper to jobbers generally" (Comm. Br. 46).

(i) Wrapping paper is sold not only to jobbers, but to wholesale grocers, chain stores, cooperatives and large consumers, and these other customers purchase much of the wrapping paper sold in the West. In 1952, Crown sold 11,658 tons of wrapping paper to independent jobbers in the West, 9,824 tons to its subsidiary Zellerbach Paper Company, and 11,606 tons to wholesale grocers, chain stores, etc. (CX 36A-Z6 [2276-2306]).

grades in the West in 1953 of approximately 480,000 tons; production of Census coarse paper grades in the West in 1953 (437,384 tons) less shipments out of the West (approximately 28,500 tons in 1952; no comparable figure available for 1953) amounted to only approximately 409,000 tons; thus, the evidence indicates that approximately 71,000 tons of Census coarse paper grades were shipped into the West in 1953 (RX 62, p. 23; RX 92A, p. 343; Pet. Br. 210, 212, 244-245).

The jobber and the wholesale grocer, chain store, etc., buy the same grade of paper and therefore compete with each other for the available wrapping paper supply. Thus, jobbers are not a "market" and no meaningful conclusion can be drawn from fragmentary data on where they (but not their competitors) buy their wrapping paper.

(ii) The Commission refers to jobbers "generally", despite the fact that there is no evidence from any paper purchaser in the eight Mountain states (eight of the 11 western states) with respect to where he buys his paper (Pet. Br. 228-229; p. 42, *supra*).

(iii) The Commission relies entirely on local western *production* statistics in arguing that Crown is the dominant *supplier* of wrapping paper to western jobbers. Thus, it recites Crown's and St. Helens' total 1952 wrapping paper *production* of 98,123 tons (Comm. Br. 45). The Commission fails to mention, however, that St. Helens and Crown together *sold* only 22,870 tons of wrapping paper to independent western jobbers in 1952 and that western jobbers bought wrapping paper from other western, as well as from non-western suppliers (Pet. Br. 215-221, 249n; CX 36A-Z6 [2276-2306]; CX 117).*

* In our Specification of Errors (Pet. App. 3-4), we complained of the Commission's statement that Crown produced 332,343 tons of wrapping paper. The Commission states that this "is of no particular significance" because the "finding is merely descriptive of Crown's over-all operations" (Comm. Br. 34n). It is nothing of the sort; the term "wrapping paper" is there used by Crown as including papers falling within the Census classifications of wrapping paper, bag paper, shipping sack paper, waxing paper, gumming paper, and many other grades of trade coarse paper. This is evident from the fact that Crown's production is lumped under only five categories: newsprint, other printing papers, wrapping paper, tissue and sanitary papers and board (CX 11, p. 18 [2000]). This broad use of the term "wrapping paper" (as opposed to the narrow usage by the Census) follows accepted trade practice (R 1918-1919).

A comparison of the production figures relied on by the Commission with the relevant sales figures follows:

Wrapping Paper — 1952 (tons)

Company	Production §	Western Sales to Jobbers #
Crown	71,444	11,658
St. Helens	26,679	11,212
Other Western	26,967	? †
Imports		? ‡

§ Comm. Br. 45.

Pet. Br. 249n (not including Crown's sales of 9,824 tons to its subsidiary Zellerbach Paper Company).

† The evidence does not permit a breakdown between sales to western jobbers and sales to western wholesale grocers, chain stores, etc.

‡ A Commission exhibit indicates average annual shipments into the West of 28,940 tons of wrapping paper (Pet. Br. 215-216). The Commission, although now claiming for the first time that the figures on its exhibit are too high, does not disparage the high order of magnitude of shipments of wrapping paper into the West revealed by its own evidence (p. 41n, *supra*). At least 13 non-western producers sold wrapping paper in the West (Pet. Br. 217-219).

(iv) Crown cannot have a "monopoly" of the "supply" of wrapping paper to western jobbers when shipments of wrapping paper into the West by southern and eastern producers apparently exceeded the *combined* wrapping paper sales of Crown and St. Helens to western jobbers (not including sales by Crown to its wholly owned subsidiary), and when substantial additional amounts of wrapping paper are available from other western producers.

3. Bag Paper

The Commission concludes, solely on the basis of western *production* statistics, that the acquisition resulted in the "supply" of western bag paper being passed from three companies (Crown, Longview and St. Helens) to two com-

panies (Crown and Longview) (Comm. Br. 47-49). The sales data in the record disprove this assertion:

Bag Paper — 1952 (tons)

Company	Production §	Western Sales #
Crown	77,485	16,153
Longview	21,782	15,500 †
St. Helens	10,834	736
St. Regis	3,270	3,270
Potlatch	9	9
Imports		?

§ Comm. Br. 47.

Pet. Br. 33, 244-245; Comm. Br. 147-148.

† Longview converts about 25% to 30% of its bag paper production. It also sold bag paper to three converters on the Atlantic Coast, but no tonnage figure appears in the evidence. (See Comm. Br. 86-87; R 1750, 1751-1754 [Wollenberg])

Consistently, Mr. Long of Graham Paper Company, St. Helens' sales agent, testified that St. Helens did not sell grocery bag paper "as a regular item" in the western states (R 2557).

In an attempt to offset the effect of this evidence in the record as to sales, the Commission argues that St. Helens converted 80% of its bag paper production and that therefore the acquisition "also" served to lessen competition in the manufacture of *bags* (Comm. Br. 48). This assertion is not only incorrect,* but completely irrelevant to the Commission's decision because the Commission deliberately

* One eastern producer alone, Hudson Paper Co., sold more bags in California than St. Helens' total sales of paper bags in all areas (compare R 2885-2886 with CX 117, p. 3).

excluded bags, a converted product, from its Census coarse paper line of commerce (Pet. Br. 27, 45-46).

4. Shipping Sack Paper

The Commission refers again only to production data; we add the evidence respecting sales which shows that St. Regis and Longview sold $2\frac{1}{2}$ times as much as Crown and St. Helens combined.

Shipping Sack Paper — 1952 (tons)

Company	Production §	Western Sales #
St. Regis	53,068	13,250
Crown	28,764	6,264
Longview	18,572	18,572
St. Helens	6,036	5,721
Imports		? †

§ Comm. Br. 49.

Pet. Br. 33, 244-245; Comm. Br. 83, 147.

† At least three non-western producers also sold shipping sack paper in the West (Pet. Br. 217-218).

Crown's position as a shipping sack paper supplier was far behind the two leaders; it was not in second place as the Commission claims (Comm. Br. 49).

While St. Helens' 1952 western sales of shipping sack paper represented 13% of sales by western mills (there is no evidence of the tonnage of sales in the West by eastern and southern mills), the Commission admits that St. Helens had planned to eliminate its sales of shipping sack paper because it found that business undesirable (Comm. Br. 83; Pet. Br. 258).

5. Envelope Paper

Envelope Paper — 1952 (tons)

Company	Production §	Western Sales #
Columbia River	7,822	?
Crown	4,140	4,072
St. Helens	3,409	3,294
Simpson Paper	287	287
Inland Empire	37	37
Imports		? †

§ Comm. Br. 50.

Pet. Br. 33, 244-245; Comm. Br. 147-148.

† At least three non-western producers also sold envelope paper in the West (Pet. Br. 217, 219).

As the above table shows, Columbia River (Salem, Oregon and Vancouver, Washington) produced more envelope paper than Crown and St. Helens combined. Faced with this dilemma, the Commission hinges its argument on the fact that Columbia River's envelope paper was made from sulphite pulp, whereas all of St. Helens' and a large part of Crown's was made from kraft (sulphate) pulp (Comm. Br. 50-51, 83-84). It thereupon asserts that the acquisition resulted in a "virtual monopoly of Crown in the West with respect to *kraft* envelope paper" (Comm. Br. 51; italics added).

The Commission, however, ignores its own finding that kraft and sulphite envelope papers are both in the same line of commerce (R 578, 589, 609-612; RX 62, pp. 38-42).

In justification of its separation of kraft and sulphite envelope papers, the Commission asserts merely that Columbia River's envelope paper was not *wholly* comparable and not *fully* competitive with kraft envelope paper (Comm. Br. 50-51). The Commission also relies on the fact that Mr. Milne of Northwest Envelope Manufacturing Company did not name Columbia River as one of his suppliers

and did not testify that Columbia River offered to sell him paper (Comm. Br. 84). Mr. Milne did *not* testify, however, that Columbia River was not an available source of supply; all he said was that he did not attempt to buy from any source other than the ones he named (R 2576).

6. Waxing Paper

Waxing Paper — 1952 (tons)

Company	Production §	Western Sales #
Crown	32,512	1,643 †
St. Helens	2,091	1,857
Potlatch	638	638
Columbia River	610	610
Longview	512	375
St. Regis	223	223
Imports		? ‡

§ Comm. Br. 50.

Pet. Br. 33, 244-245; Comm. Br. 86-87, 147-148; R 1750, 1752 [Wollenberg].

† This great disparity is due to the fact that Crown used approximately 30,000 tons of its waxing paper production in its own converting operations.

‡ West Virginia Pulp & Paper Co., a large non-western producer, sold waxing paper in the West (Pet. Br. 219).

Almost all of St. Helens' sales of waxing paper were made to one customer, and he had gone out of the waxed paper business even before the hearings in this case ended because his product was displaced by another packaging material, namely, the corrugated box (Pet. Br. 259; CX 117; R 1583, 3785-3786 [Ticoulat]; and see Comm. Br. 87).*

* The Commission accuses us of "grossly misrepresent[ing]" the testimony of this witness with respect to his sources of supply (Comm. Br. 87n). We said (Pet. Br. 259) that he "could have" purchased from Longview, relying on his testimony that Longview offered to sell him fibre cartons and, at the same time,

Crown can hardly be charged with having a monopoly of waxing paper as a result of the acquisition when in 1954, *after* the acquisition, Potlatch (which prior thereto produced hardly any waxing paper) produced 2,921 tons of waxing paper, or more than St. Helens did before the acquisition (Comm. Br. 52).

7. Gumming Paper

Gumming Paper — 1952 (tons)

Company	Production §	Western Sales #
Crown	5,615	200
St. Helens	823	695
Longview	587	587
Imports		? †

§ Comm. Br. 53.

Pet. Br. 33, 244-245; Comm. Br. 85, 147.

† International Paper and Nekoosa-Edwards, non-western producers, also sold gumming paper in the West (R 1466-1467).

The Commission says that gumming paper “quantities . . . are not very large but the competitive results are nevertheless representative of the results in all markets affected by the merger” (Comm. Br. 53). The actual result was that when St. Helens was acquired by Crown,

said it would be glad to furnish him other grades if he chose to change his source of supply (R 1417), and that “presumably” he could have purchased from Oregon Pulp (now Columbia River), relying not on his testimony as the Commission claims, but on the fact that Oregon Pulp produced waxing paper at Salem, Oregon (CX 168A [4049]; R 2124).

It is the Commission which has misrepresented the testimony of this witness. The Commission states that Longview offered to sell him “waxing paper only in connection with the sale of fibre cartons (R 1417)” (Comm. Br. 87). This statement is based on the witness’ testimony that he “presume[s]” Longview’s offer was so conditioned, which testimony was *stricken* from the record as being only the witness’ unproved assumption (R 1417).

Longview increased its gumming paper production to 832 tons (Comm. Br. 53-54) and the one known customer in the West for gumming paper added the non-western manufacturers International Paper and Nekoosa-Edwards as additional sources of supply (R 1466-1467).

The "representative" example is proof of the availability of Census coarse paper grades from other western mills and from eastern and southern mills.

8. Asphalting paper, creping paper, cup stock, twisting and spinning stock, glassine and greaseproof paper, vegetable parchment, and other converting paper.

The Commission is silent with respect to these grades of paper even though all of them are included in the Commission's "Census coarse paper" line of commerce (RX 62, pp. 38-42). Of these grades, St. Helens in 1952 produced 208 tons of glassine and greaseproof paper and 3,730 tons of "other converting" paper (CX 168A [4049]).

9. Conclusion.

The foregoing discussion demonstrates that "competition" cannot be discussed in terms of local *production* data, but must be discussed in terms of *sales*, and that the Commission's conclusions with respect to "competition" in the sale of wrapping paper to jobbers and in the sale of converting papers to converters, all of which are based solely on local western *production* data, are contradicted by the evidence as to sales in the West by both western and non-western producers.

By improperly using local western "production" as a synonym for local western "supply", a word which clearly connotes "sales" (e.g., Comm. Br. 45-46, 49, 54-55), the Commission seeks to avoid the necessity of discussing the *sales* of Census coarse paper grades in the West by either western or non-western producers. The Commission makes no mention of the substantial shipments of wrapping

paper into the West by eastern and southern mills, of the substantial shipments of paper generally (which must include large quantities of Census coarse paper converting grades) into the West, or of the 64 non-western producers who sell in the West, at least 25 of whom sell Census coarse paper grades (Pet. Br. 215-219).

Finally, we point out that in this section of its brief and elsewhere the Commission alleges, as if it were significant, that only Crown, St. Helens and Longview produced and sold a broad array of Census coarse paper grades (Comm. Br. 55, 184-185, 204). Neither the jobber nor the converter purchases a broad array of Census coarse paper grades. The only Census coarse paper grade purchased by the jobber is wrapping paper and the only Census coarse paper grade purchased by the converter is that grade of converting paper which he converts (Pet. Br. 248, 257; see also CX 117).*

C. The Commission has failed to prove that the acquisition had any anti-competitive effects on western jobbers.

The Commission claims, first, that as a result of the acquisition western jobbers became dependent on Crown for their supply of wrapping paper (Comm. Br. 57-60). We have already demonstrated that this conclusion is based solely on local production data and is contradicted

* The Commission, claiming that when a jobber talks about a "full line" of papers he "presumably" means a large variety of wrapping papers, refers to the various kinds of wrapping papers purchased by the jobber Packer-Scott in 1952 (Comm. Br. 158). The Commission fails to point out that in the same year Packer-Scott also purchased, *from St. Helens alone*, waxed paper, vegetable wrap, toweling, tagboard and 17 different kinds of bags (CX 117, pp. 128, 332). The only permissible conclusion is that when a jobber says he buys a "full line" he means a full line of *trade coarse papers*; he is not referring to the highly artificial Census classification of "Census coarse paper".

by the relevant western sales data contained in the record (pp. 47-49, *supra*).

The other alleged anti-competitive effects of the acquisition on western jobbers are based on a few remarks made by six of the jobber witnesses; one deals with a situation in 1949 and the others all relate to a period of shortage in 1955 when paper mills generally were forced to put their customers temporarily on allocation (see Pet. App. 21).

As a springboard to this discussion, the Commission asserts that Crown's ownership of a paper jobber, Zellerbach Paper Company, was "an unwholesome business condition" (Comm. Br. 60-61). This statement of the Commission, as well as others respecting the alleged effect of Crown's ownership of Zellerbach Paper, are not supported by any evidence in the record whatsoever.

1. The evidence does not support the Commission's claim that jobbers have been injured by "buying from a competitor".

The only witnesses referred to by the Commission in this connection are Messrs. Finch, Eagle and Huber (Comm. Br. 61-65).

Mr. Finch was a hostile witness whom the Hearing Examiner arbitrarily refused to let Crown cross-examine as to bias or as to the accuracy of his testimony (R 2459-2465). Although Mr. Finch testified that when a jobber buys from only one source, he tends to be "taken for granted", and that when he buys from a competitor he runs the risk of being put out of business (Comm. Br. 63), his testimony is strangely inconsistent with his refusing to buy from International Paper when it solicited his business. His explanation—that later, when all mills were putting their customers on allocation, International might have become an uncertain source of supply—is unconvincing (Pet. App. 24-25; R 2454-2455). The evidence shows fur-

ther that Publishers' Paper Co. (Oregon City) and others also offered him paper (R 2445-2446).

Mr. Eagle, of Houghtelin Paper Company, felt that his customers were confused when both he and Zellerbach Paper Co. sold paper manufactured by Crown (Comm. Br. 63-64). The confusion that Mr. Eagle claimed was not, however, caused by the acquisition; he bought \$42,867 of wrapping paper from Crown in 1952, *prior* to the acquisition (CX 36D [2279]).*

The testimony of Mr. Huber does not support the Commission's statement. He said merely that he bought from St. Helens partly "so that we wouldn't have too many eggs in one basket" (Comm. Br. 62; R 1430-1431); he said nothing about "buying from a competitor". Furthermore, the same witness testified unequivocally that at or shortly after the time of the acquisition of St. Helens, there were other sources from which he could have bought wrapping paper (R 1435, 1444-1445).**

2. The acquisition did not create a "warehouse problem" for jobbers.

The Commission accuses us of having

" . . . grossly misrepresented the record as to St. Helens' practice with respect to direct shipments (Pet. App. at 47, 61). The evidence is only one way: St. Helens accommodated its jobbers and made di-

* It should also be noted that Mr. Eagle's company, even when there was a shortage of paper, was able to buy wrapping paper from International Paper, a non-western producer, and has purchased wrapping paper from Hudson (another non-western producer) and St. Regis (R 1340, 1346-1349, 1356-1358, 1366).

** Incidentally, Crown was Mr. Huber's major supplier even before the acquisition and, when Mr. Huber was asked why he did not buy from other mills, he made a point of his "strong loyalty . . . for Coast manufacture" (R 1429-1430).

rect shipments outside a jobber's trading area." (Comm. Br. 67)

We correctly stated that Crown's policy was to make deliveries for jobbers only in the market area where the jobber maintained a warehouse and that "St. Helens had exactly the same policy (R 2859, 2861)" (Pet. App. 47). This statement accurately reflects the testimony of Mr. Landsberg, a Los Angeles jobber and a witness for the Commission, that it was St. Helens' announced policy (before its acquisition by Crown) not to deliver to his customers in areas outside Los Angeles County (R 2857, 2861).^{*} The whole "warehouse problem" section of the Commission's brief is not based on St. Helens' policy, but on two exceptions which the Commission found to St. Helens' policy.^{**}

The Commission's only other reference is to Mr. Wilson (Comm. Br. 67), who did *not* testify that St. Helens made direct deliveries for him outside his regular trading area (R 2866-2867, 2869-2870).

3. The acquisition did not create a "scheduling and delivery problem" for jobbers.

We again meet Mr. Houghtelin and Mr. Huber (Comm. Br. 69).

* The evident basis for the policy of both Crown and St. Helens is that no jobber function is being performed in sales by the jobber outside his trading area.

** International Paper apparently had no such policy, and therefore Houghtelin (one of the exceptions to the rule) was able to get International Paper to make these direct deliveries from its mill in Alabama to Houghtelin's customers in Los Angeles, Portland and Seattle, at the same price that western mills would charge (R 1346, 1348-1349, 1356-1357).

The Commission would ascribe the limit on the volume of new business International Paper would accept from Houghtelin to the alleged high cost of freight (Comm. Br. 68), whereas the testimony seems to ascribe it to International Paper's trying to get new customers "here on the Pacific Coast" (R 1356).

Mr. Houghtelin's testimony on July 14, 1955 (R 1339) was that "today", *i.e.*, during the period of shortage (Pet. App. 21), it takes longer to get a shipment than it did prior to Crown's acquisition of St. Helens in 1953 (Comm. Br. 69).

Mr. Huber's testimony was even clearer:

"A. Well, recently deliveries have slowed up.

"Q. Do you know why? A. Well, we have a shortage of paper. The mills can't turn it out quite as fast and expediently as they could awhile back." (R 1430)

The Commission next discusses the minimum quantities which Crown requires before it will produce a special grade paper and the fact that St. Helens had smaller minimum requirements (Comm. Br. 70-72). This is what the president of St. Helens referred to as the "cat and dog business" which St. Helens had to eliminate if it were to stay in business (R 2136-2138, 2182-2183, 2296 [Oberdorfer], 2555-2556 [Long]; RX 24[4695]).*

4. The acquisition did not create "allotment problems" for jobbers.

The Commission's whole section on allotment (Comm. Br. 73-77) is based on a misrepresentation of the record.

As a result of an increasing general shortage of paper, accentuated by the fact that certain customers were beginning to order in excessive amounts beyond their normal requirements, Crown put its customers on allocation effective June 1, 1955 (R 3779-3780 [Ticoulat]). This started as a "grade allocation" because that is the way in which Crown's IBM records are kept; shortly thereafter custo-

* For example, the minimum quantity which Crown would produce of a special width of paper was 1 ton while St. Helens' minimum was 1/4 ton; one ton of this paper costs \$200 (R 2900-2901; cf. Comm. Br. 82n).

mers were permitted to exchange allocations as between grades and Mr. Ticoulat, Crown's sales vice-president, testified that he knew of no instance where such a request was denied (R 3780).

Despite this testimony, Commission counsel submitted a proposed finding to the Hearing Examiner (R 247) that the change from a grade allocation to an over-all allocation was not made until after the "allotment program had been described in the record in this case", which was July 14, 1955 (R 1339).

The Hearing Examiner refused to make such a finding and found, instead, exactly in accordance with Mr. Ticoulat's testimony, that the change was made "within a few weeks" after the allotment program was started (R 582), which was on June 1, 1955 (R 3780 [Ticoulat]). The Hearing Examiner thus found that the change in allotment was prior to any testimony on the subject in this case.

Completely ignoring this finding, which it adopted (R 605), the Commission now reasserts what its counsel proposed to the Hearing Examiner, to wit, that the change "occurred only after the practice was exposed by the testimony of the jobbers in this case" (Comm. Br. 76-77).

Apart from this flat misstatement of the record, the Commission's only argument respecting the allotment situation is that, "if" Crown had increased its wrapping paper production during the period of allotment, the independent jobbers would not benefit (Comm. Br. 73). A more reasonable conclusion is that, if production had increased, allocation would have come to an end (see R 3781 [Ticoulat]).

5. It is not Crown's policy to refuse to sell to jobbers.

Mr. Caskey, a jobber, testified that in 1949 (over four years before the acquisition of St. Helens) Crown refused to sell him paper (R 1447-1450). The Commission quarrels

with our statement that "this episode obviously reflects a shortage of paper in 1949" (Comm. Br. 79n).

Mr. Caskey started in business the first week of February 1949 and the episode he refers to must have preceded his entry into business (see R 1448-1450). Crown did not go off World War II allocations until January 1, 1949 (R 3781 [Ticoulat]).*

The Commission was unable to find any other instance of a refusal to sell by Crown, either before or after the acquisition of St. Helens, and the evidence is clear that such is not the policy of Crown (Pet. App. 47; R 1657-1658 [Ticoulat]).

6. Conclusion.

The foregoing represents the Commission's total list of claimed anti-competitive consequences to western jobbers arising out of Crown's acquisition of St. Helens. Every assertion, however, is either erroneous or misleading.

D. The Commission has failed to prove that the acquisition had any anti-competitive effects on western converters.

The Commission claims that, as a result of the acquisition, western competitors were "required to look to Crown principally for their requirements" even though Crown was "one of their main competitors" (Comm. Br. 88-89). This assertion is wholly without merit.

(i) The Commission refers only to bag paper, shipping sack paper, waxing paper, envelope paper and gumming paper (Comm. Br. 81-88). The Commission claims no adverse effect on converters of creping paper, asphaltting paper, cup stock, glassine converting papers and many of

* Mr. Oberdorfer, St. Helens' former president, was unclear whether the change from a sellers' to a buyers' market occurred at the end of 1948 or the beginning of 1949 (R 2295).

the other converting papers included in the Census coarse paper classification; these converting papers in the aggregate represented 22% of the Census coarse paper grades purchased by converters (*i.e.*, all Census coarse paper grades other than wrapping paper) (see RX 62, pp. 10-11).

Of the remaining 78% of the converting grades, bag paper represented 33% and, as we have seen above, St. Helens was not in the bag paper business (see RX 62, pp. 10-11; pp. 49-51, *supra*).

28% of the Census coarse paper grades purchased by converters consists of shipping sack paper, a grade of paper which St. Helens had planned wholly to discontinue (see RX 62, pp. 10-11; p. 51, *supra*).

Thus, the acquisition could not possibly have had any substantial effect on competition with respect to Census coarse paper converting grades representing 83% of the total of the Census coarse paper grades purchased by converters.

Nor did the acquisition adversely affect converters purchasing the remaining 17% of the Census coarse paper converting grades, namely, waxing paper, envelope paper and gumming paper (RX 62, pp. 10-11).

St. Helens' sales of waxing paper were made principally to one customer, Salinas Valley, who had gone out of the waxed paper business before the hearings in this case ended (p. 53, *supra*); Columbia River produced more envelope paper than Crown and St. Helens combined (p. 52, *supra*); and the one western customer for gumming paper, Adhesive Products, added two non-western suppliers after the acquisition (pp. 54-55, *supra*).

(ii) Of the converter customers of St. Helens who were selected as Commission witnesses, only two competed with Crown in the sale of their converted products (R 1463,

1485).^{*} Los Angeles Paper Bag's long-standing position as a customer-competitor of Crown was not changed by the acquisition, nor was the availability to it of St. Regis as another source of supply, and after the acquisition, Los Angeles Paper Bag had Weyerhaeuser and Western Kraft as additional sources of supply (R 1471-1472). Crown's other converter-competitor, Adhesive Products, is supplied by Longview and by the non-western suppliers International and Nekoosa-Edwards, as well as by Crown (R 1460-1461, 1466-1467).

(iii) Contrary to the Commission's assertion in its brief, the evidence is that western converters of the Census coarse paper grades are not dependent on Crown as a result of the acquisition (Pet. Br. 256-261).

This was recognized by the more cautious language used by the Commission in its opinion, which was merely:

"It likewise *appears* that *many* [*i.e.*, some] converters which formerly could look to St. Helens for purchases of the relevant papers must now depend upon Crown as *a* [*i.e.*, one of a number] primary source of supply" (R 616-617; italics added)

E. The Commission fails to consider the dynamic nature of the paper industry.

Despite the undisputed proposition that all relevant economic factors must be examined in a Section 7 case to ascertain the probable economic consequences (Pet. Br. 35-39, 263-264), the Commission completely ignores the paper industry's phenomenal growth, particularly in the West, the low level of concentration in the paper industry in the West, the great opportunity there for new entry and fur-

* Crown also competed with Salinas Valley in the sale of waxed crate liners before crate liners became a victim of progress (R 1405 and 1583, 3785-3786 [Ticoulat]).

ther growth, the vast supply in the West, in the form of sawmill and plywood mill residuals (chips) and forest residuals, of the basic paper-making raw material, pulpwood, and the resulting diminution of Crown's position in the West (Pet. Br. 58-69, 264-273).*

The Commission does not argue with this evidence because it cannot be disputed; this evidence proves that there is no reasonable probability that the acquisition will substantially lessen competition or tend to create a monopoly, even in the extremely narrow and unrealistic western Census coarse paper "market" found by the Commission.

F. The Commission has neither rebutted nor taken into consideration the other relevant economic evidence.

The only economic factors which the Commission considered relevant to its discussion of competition (Point I of its brief) were statistics as to local western production of Census coarse paper grades and the testimony of a few jobbers and converters on the Pacific Coast (Comm. Br. 39-43, 175). The other relevant economic factors were either ignored by the Commission or glossed over in Point IV of its brief.

1. St. Helens planned largely to abandon the production and sale of the Census coarse paper grades.

The Commission is forced to admit that St. Helens wanted

* The Commission thrusts aside our demonstration of Crown's declining position in the West, asserting, without support or reference to evidence, that it does not present Crown's true standing with respect to the Census coarse paper grades (Comm. Br. 56n). The Commission does not even attempt to answer our showing that Crown's decline in the West generally is consistent only with a proportionate decline with respect to the Census coarse paper grades (Pet. Br. 68-69).

to swing its production out of the unbleached papers—which formerly accounted for two-thirds of its entire output—and into the heavier weight bleached grades, practically all of which are outside the Commission's Census coarse paper line of commerce (Comm. Br. 176-179; see Pet. Br. 108-114). The Commission claims only that St. Helens planned to continue selling wrapping paper to its jobber customers (Comm. Br. 178, 179).

Even if the Commission's claim were correct—which it is not*—the Commission's decision would still have to be set aside because the sale of wrapping paper to jobbers is not the "market" found by the Commission.**

2. The paper industry adjusts flexibly to meet changing market demands.

A paper mill can and will, because of the flexibility of its equipment, change its pattern of production with changes in the relative profitability of producing different grades of paper (Pet. Br. 51-55, 160-169, 273-275; pp. 24-29, *supra*).

Therefore, the overhanging capacity of Crown's western competitors to produce Census coarse paper grades (*e.g.*, Pet. Br. 167n) is an absolute bar to artificial shortages or artificial prices and a factor which must be considered in determining whether the effect of Crown's acquisition of

* The president of St. Helens thought that the mill was losing money on wrapping paper and, in addition, wanted to get away from jobber orders for small quantities of special grades of paper which he referred to as "cat and dog" business (Pet. Br. 108-109, 114, 276n; R 1844-1845 [Hunt], 2136-2138, 2182-2183, 2296 [Oberdorfer], 2555-2556 [Long]; RX 24 [4695]).

** The Court should note that wrapping paper, to which the Commission devotes most of its attention, represents only about 20% of the Census coarse paper grades (RX 62, pp. 10-11). Furthermore, jobbers are only one of several types of purchasers of wrapping paper (pp. 47-48, *supra*). Thus, the sale of wrapping paper to jobbers represents only a small fraction of the sales of all the Census coarse paper grades.

St. Helens may, "in the long run", be substantially to lessen competition.

3. The eight new entrants into the West cannot be ignored.

In our main brief, we demonstrated that eight new competitors have made their appearance in the paper industry in the West since 1949 and that six of them have made their appearance since Crown's acquisition of St. Helens in 1953 (Pet. Br. 266-272).

The Commission claims, however, that four of these companies (St. Regis, Weyerhaeuser, Potlatch and Western Kraft) produced and sold only limited or small quantities of the Census coarse paper grades, that one of them (Scott) does not produce any Census coarse paper grades, that the paper making facilities of all of them are "devoted" primarily to the production of grades of paper other than Census coarse paper grades, and that therefore they are not competitors of Crown with respect to Census coarse paper grades and constitute no threat to Crown's alleged position in the western "Census coarse paper market" (Comm. Br. 199-202).

The Commission can advance this argument only by ignoring its own findings and the evidence of production flexibility (pp. 24-29, *supra*). These new entrants, like the established companies, will respond to the law of supply and demand and produce and sell those products which have the highest demand and profitability, whether they be Census coarse paper grades or other grades of trade coarse paper (Pet. Br. 166-169, 270-271; RX 92A, pp. 36-37, 471-472).

As to the sixth new competitor, R-W Paper Company, the Commission admits that it will produce *only* Census coarse paper grades, but argues irrelevantly that it will not produce "a broad line" of Census coarse paper grades (Comm. Br. 202).

Georgia-Pacific and International Paper, the last two new entrants, are ignored by the Commission because they had not yet built their mills when the record was closed and because the record did not indicate what grades of paper they were going to produce in the West (Comm. Br. 202-203). The Commission misconceives the Section 7 standard of illegality: Section 7 is concerned with what "may be", *i.e.*, with the future (Pet. Br. 38-39) and any lessening of competition is temporary and therefore insignificant if new, vigorous and substantial competitors are on the threshold of the market.

That Georgia-Pacific and International had not yet determined what grades of paper they would sell only proves the flexibility of the paper industry. For example, Georgia-Pacific stated that it will let the product mix of its new "flexible" mill be determined by "the market situation at the time the mill goes into production" (RX 96 [5120]).

4. St. Helens was an ineffective competitor and its prospect of rehabilitation was remote.

In an unsuccessful attempt to rebut the overwhelming evidence of St. Helens' ineffectiveness as a competitor (Pet. Br. 81-114), the Commission points to St. Helens' past financial statistics, argues, without reference to substantial evidence, that St. Helens' deplorable situation was a temporary one limited to the period of St. Helens' rebuilding program, and claims, contrary to the clear evidence, that while St. Helens needed additional financing to complete its rebuilding program, the money was available (Comm. Br. 205-227).*

* The Commission also asserts, contrary to the clear evidence (Pet. Br. 98-100; Pet. App. 66-68), that St. Helens' rebuilding program was sound and well-conceived. The only argument it makes in support of this assertion, however, is that it must have been sound and well-conceived because Crown carried it for-

(i) *St. Helens' past financial statistics are misleading:*

The past financial statistics for St. Helens cannot overcome the clear proof of St. Helens' ineffectiveness as a competitor in 1952 and 1953 and of its inability to survive in a competitive market (Pet. Br. 81 *et seq.*).

The clearest demonstration of how misleading bare financial statistics can be is the fact that the Commission's so-called "acid test ratio" (its term for the ratio of current assets less inventory, to current liabilities) shows that St. Helens was in the "soundest" financial condition in its history at December 31, 1952 (Comm. Br. 221). The facts, however, demonstrate how precarious St. Helens' financial condition actually was at that time.

St. Helens had just borrowed \$4,000,000; the cash, when received, was a current asset, whereas the debt was treated as a long-term and not a current liability (CX 51 [2841]). Yet, St. Helens' current assets (less inventories) at the end of 1952 were *less* than at the beginning of the year, and its resources were so depleted that it could not meet its commitments to pay for the rebuilding of its No. 1 machine (which was the heart of its whole rehabilitation program); St. Helens was forced to suspend the rebuilding contract and, as a result, faced a total loss of the approximately \$500,000 it had already paid for work done by the machine manufacturer (CX 51 [2841-2842]; Pet. Br. 99-100). Thus, St. Helens' current asset position at December 31, 1952 was completely inadequate to meet its contract obligations, despite its favorable "acid test ratio".

Nor can the Commission's tables of past financial statistics explain away the fact that St. Helens' operating

ward to completion (Comm. Br. 207, 209-210). Crown did complete the items in St. Helens' program which St. Helens had started but left unfinished, but Crown had to spend over \$2,000,000 on improvements which should have been included in St. Helens' program, but were not (R 564-565, 2965-2967 [Hunt], 3861-3863 [Carpenter]; RX 44A-B [4750-4751]).

profits gradually declined during 1952 until it sustained a loss from operations in the last quarter (RX 23E-H [4685-4691]).*

(ii) *St. Helens' deplorable situation was not caused by its rebuilding program*: The only evidence referred to by the Commission to support its claim that St. Helens was merely "weathering the temporary difficulties caused by its construction program" is an equivocally optimistic letter to stockholders from St. Helens' president contained in St. Helens' 1952 Annual Report (Comm. Br. 214, 222-223).**

However, in October, 1952, St. Helens' president stated in a *private* letter that only "*Some of our troubles will be remedied as the modernization program progresses . . .*" (RX 21 [4675]; italics added). The evidence also proves that the disproportionate quantities of unbleached paper which were produced by St. Helens in 1952 were only "partly" attributable to the rebuilding program (R 2318; see, also, R 2263 [Oberdorfer]; cf. the Commission's misstatement of this testimony [Comm. Br. 207]); and that even before the rehabilitation program began, St. Helens could not produce "continuously" a No. 2 Yewbo kraft which met government specifications (R 2263 [Oberdor-

* The Commission refers to St. Helens' \$101,340 of profit in the first three months of 1953 (Comm. Br. 214), which would appear to be due at least in part to the fact that in the months preceding the acquisition in June, 1953 Crown started to purchase paper from St. Helens (R 1721 [Ticoulat]). Even at an earnings rate based on this \$101,340 of profits, St. Helens would have had little, if any, margin to continue its rehabilitation program after paying interest and amortization on the \$4,000,000 it borrowed in 1952; no interest or amortization was payable in the first quarter of 1953 (Pet. Br. 84; CX 4, pp. 41, 59 [1755, 1773]; RX 49, p. 11 [4793]; RX 50, p. 9 [4803]).

** "Increased earnings resulting from the large capital expenditures we have made *should* begin to be realized in 1953" (Comm. Br. 222; italics added).

fer]). In fact, generally, from 1947 through 1953, the quality of paper off the No. 1 machine was "not very good" and "there was room for considerable improvement" (R 3608-3609 [Goodwillie*]).

Consistently, Dr. Carpenter, an independent paper consultant retained by Olin Industries to study the St. Helens mill when Olin was considering the acquisition of St. Helens (Pet. Br. 83), testified:

"In my opinion the physical condition of the mill was what I would call poor. Their housekeeping was bad. There was dirt and litter inside and outside the mill. The condition of the equipment by and large, the old equipment by and large, was not first-class. It lacked in maintenance.

"In addition, in my opinion they hadn't kept the mill sufficiently modern to be competitive. It was still operating and was operating at a level you might consider—well, it's all right, but seeing—I am particularly, if I may digress here, conversant with the paper industry in the south which is a relatively new industry. We have many new mills and even if the mill is 20 years old, it looks new. It is kept modernized. They keep pace with the newer develop-

* At one point in its brief, the Commission quotes only a part of Mr. Goodwillie's testimony to give the incorrect impression that Mr. Goodwillie had no quarrel with the maintenance conditions of St. Helens' machines (Comm. Br. 209). The Commission omitted the testimony of Mr. Goodwillie that, in 1953, St. Helens was still operating its No. 1 machine with its original but out-of-date rope drive, whereas other mills had long since replaced the rope drive with a more modern type of mechanical drive; that the old fashioned natural draft ventilating hood on the No. 1 machine was penalizing production by about 5% to 10%; and that the reel and winder parts of the No. 1 machine were worn out and needed replacement and were causing spoilage of paper and loss of production (R 3603-3607, 3626).

ments in the industry, and a piece of equipment may only be ten years old but if there is something more efficient, it will be replaced. And this mill wasn't the case—old, obsolescent equipment in there, still operating, with the penalty in operating costs, high maintenance costs, and even at that not too well maintained, and frankly, I was quite surprised that a mill of this size and with a past record, a good past record, was in that deplorable—to me it was deplorable, sorry state, as when I saw it in January 1953.” (R 3864-3865)

There is nothing in this testimony to suggest that St. Helens’ “sorry state” was due to the rebuilding program.*

(iii) *The additional financing St. Helens needed was not available*: The Commission accuses us of basing this contention on “a misleading selection of bits of evidence” (Comm. Br. 210).

First, it claims that St. Helens needed only \$2 million more and not, as we state, a *minimum* of \$2,425,000 (Comm. Br. 210). The Commission’s \$2 million figure is based on a cost estimate of \$8,875,000; however, engineers retained at the request of St. Helens’ creditors found, and St. Helens’ president agreed, that the \$8,875,000 estimate was

* The Commission disputes the conclusion that the small value of the St. Helens’ mill is demonstrated by the fact that the total purchase price of all of St. Helens’ assets was approximately \$9,557,000, which included timberlands with an \$8 million retail value (Comm. Br. 226-227). It is no answer for the Commission to talk about the comparative “book value figures” for Crown’s and St. Helens’ timber holdings (Comm. Br. 227). The \$1,346,236 book value of St. Helens’ timberlands substantially understated their actual value (CX 4, pp. 9, 57 [1723, 1771]). The \$8 million figure was *found* by the Commission as a fact (R 558).

too low and that \$9.3 million would be required (Pet. Br. 84).*

The Commission then claims that the additional financing was available, referring to a paragraph from the minutes of a St. Helens Board of Directors meeting (Comm. Br. 210-211). This very paragraph, however, squarely contradicts the Commission's conclusion; it states that

“ . . . neither [of the lenders] would go for an additional loan.” (Pet. Br. 101)**

Further proof of the unavailability of the additional financing which St. Helens needed is the fact that on March 17, 1953, two months after the Board meeting referred to above, St. Helens' president told the stockholders that

“As of December 31, 1952, funds are available to complete all phases of the program *currently underway*.” (CX 51, p. 5 [2836]; italics added)

No representation was made that either funds or financing was available for the whole \$9.3 million of St. Helens' program; on the contrary, the same report to stockholders stated that the contract to rebuild the No. 1 machine had been suspended

“ . . . since it appeared additional financing would be necessary in order to complete this part of the program.” (CX 51, p. 5 [2836])

* Dr. Carpenter, another independent expert, found that, over and above the \$9.3 million, \$4 million would be needed for several items not included in St. Helens' program, but which were necessary for even minimum operation of the mill (Pet. Br. 103-104; R 3861-3863).

** Although we and the Commission both rely on this same paragraph, only we set it forth *in haec verba* (Pet. Br. 101; Pet. App. 5-6, 69). The Commission paraphrases it, *and paraphrases it incorrectly* (compare Comm. Br. 211 with RX 12Z-103 [4601]).

Unless its whole program could be completed, St. Helens' hopes for survival were slim (Pet. Br. 100; Pet. App. 69) and its "prospect for rehabilitation . . . remote" (*International Shoe Co. v. FTC*, 280 U. S. 291, 302 (1930)).

(iv) *The Commission ignores the other evidence of St. Helens' ineffectiveness as a competitor*: St. Helens' own president said that the Company's management would have to be corrected "before we will be on a truly competitive basis" (RX 21 [4675]). Yet, the Commission argues that St. Helens' management was competent, relying solely on tables of past statistics (Comm. Br. 223-224).

The Commission also ignores the fact that St. Helens' maintenance control was practically nonexistent, that quality control was completely lacking, that St. Helens had no cost accounting system or cost controls on a grade by grade basis, that it had only eight salesmen in the West who spent most of their time just taking orders from old customers, that St. Helens' mill was forever making short runs of paper which St. Helens' president referred to as "cat and dog" business (*e.g.*, \$50 orders for ¼ ton of a special width of paper; R 2900-2901) and that St. Helens' "policy" was to be a price "follower" (Pet. Br. 90, 111-113).

It was therefore not surprising that the Hearing Examiner *refused* to adopt the requested finding of Commission counsel that St. Helens was an "effective" competitor (Pet. App. 14).

The Commission labels as a "ridiculous assertion" our statement that the Hearing Examiner refused to find that St. Helens was an "effective" competitor (Comm. Br. 104n). The following comparison of the finding proposed by Commission counsel with the Hearing Examiner's finding completely supports this "ridiculous assertion":

Commission Counsel's
Proposed Finding

"228. St. Helens was engaged in *effective* competition directly and primarily in the 11 western states. . . ." (R 214; italics added).

Hearing Examiner's
Finding

"74. St. Helens was engaged in competition directly and primarily in the eleven Western States. . . ." (R 580).

In a further effort to make St. Helens an "effective" competitor, the Commission claims that the Hearing Examiner found that St. Helens was "able to continue as a *successful* competitor" (Comm. Br. 10; italics added). There is no citation for this claim and it is not the fact; the Hearing Examiner made no such finding.

The Commission repeatedly asserts that Crown's sales vice-president, Mr. Ticoulat, characterized St. Helens as "a very aggressive competitor (R 1568)" (*e.g.*, Comm. Br. 11, 104, 168), misstating Mr. Ticoulat's testimony:

"Q. Well, isn't it a fact that *you* [Crown] met [St. Helens] in the 11 western states rather than the entire area [west of the Mississippi]?"

"A. Very aggressively in the 11 western states." (R 1568; italics added)

The evidence is all one way: St. Helens was not an effective competitor and its acquisition by Crown could not have resulted in *substantially* lessening competition, no matter how narrowly the relevant market is defined.*

* In answer to our showing that St. Helens had a rapidly declining position as a western supplier because of the absolute decline at St. Helens and the rapid expansion by its competitors (Pet. Br. 96-97), the Commission merely recites that St. Helens' *production* of Census coarse paper grades, as a percentage of total western production of such grades, declined only from 13.9% in 1947 to 12.1% in 1952 (a 14% decline) (Comm. Br.

G. Conclusion — The evidence proves that the acquisition will not have the adverse competitive consequences prohibited by Section 7.

The Commission's brief is very explicit as to the factors the Commission considers relevant to the question whether the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the western Census coarse paper "market". These factors are (1) the local production in the West of Census coarse paper grades, (2) the sale of Census coarse paper grades to jobbers and (3) the sale of Census coarse paper grades to converters (Comm. Br. 42, 175).

(i) Local production, however, cannot be equated with sales; the sales statistics tell a far different story and demonstrate that the Commission's conclusions, based on production alone, are incorrect and misleading (pp. 45-56, *supra*).

The Commission is under the fatal disadvantage that none of its evidence with respect to *sales* was addressed to its "Census coarse paper market". This is the natural consequence of waiting until after the evidence is closed before "identifying" the line of commerce to which the evidence should have been addressed (see Comm. Br. 236-237).

Thus, we find that the Commission's survey was addressed to a market far different from the "Census coarse paper market" which the Commission "identified" after the record was closed. Table V, appearing at page 125 of our main brief, demonstrates that the survey covered only some of the Census coarse paper grades and intermingled many items which the Census does not classify as "coarse

216n). The Commission ignores the further vital fact that in 1952 St. Helens was unable to sell much of the paper it produced (Pet. Br. 92-96), and therefore its position as a *supplier* declined much more sharply than 14% between 1947 and 1952.

paper". Therefore, even if the survey had been competently conducted and produced reliable evidence, the results would have been useless because they would have yielded no statistics on the purchase of Census coarse paper grades.

The Commission's only attempt at evidence of inter-regional shipments was the I. C. C. data which it introduced (CX 86-90 [3083 *et seq.*]). Again, however, the classifications of the I. C. C. do not follow the Census classification system and therefore the I. C. C. data do not yield any overall statistics for Census coarse paper grades or statistics for any individual Census coarse paper grade other than wrapping paper (Pet. Br. 215-216).

There can be no clearer demonstration of the impropriety of not "identifying" the relevant line of commerce until after the record is closed. The Commission's order in this case depends upon the ignorance which results from the lack of evidence addressed to the line of commerce which the Commission later "identified", rather than the intelligence which could have been brought into the record had the line of commerce been alleged and proved at the outset of the hearings.

(ii) The Commission's consideration of jobbers is directed to only a fragment of its "market"; it ignores the other classes of purchasers who buy the one Census coarse paper grade (wrapping paper) purchased by jobbers and it ignores even jobbers who are located in eight of the 11 western states. Even for this market fragment, the Commission was unable to prove its assertion of competitive harm and dependence on Crown as a source of supply (pp. 47-49, 56-62, *supra*).

(iii) The Commission is unable to cite any evidence to support its claim that western converters are dependent on Crown as a source of supply (pp. 49-55, 62-64, *supra*). Converting papers represent about 80% of the Census coarse paper grades (RX 62, pp. 10-11).

(iv) The Commission's competition argument is completely divorced from the evidence as to the nature and extent of competition (pp. 64-75, *supra*).

The Commission's brief demonstrates its inability to support, by substantial evidence on the whole record, its conclusion that the effect of the acquisition of St. Helens may be substantially to lessen competition or to tend to create a monopoly in the sale of Census coarse paper grades in the 11 western states. The order of the Commission must, therefore, be set aside.

POINT IV

The Commission has not met our proof that it committed substantial, prejudicial and reversible errors, and deprived Crown of its constitutional right to a fair hearing according to due process of law.

A. The Commission's order must be set aside because it received in evidence and refused to strike from the record its inadmissible survey report and the testimony of its economist based entirely on the inadmissible survey report.

The Commission does not deny that it conducted a secret, *ex parte*, mail-order survey; that it directed the Hearing Examiner to receive the survey report in evidence in violation of Section 7(b) of the Administrative Procedure Act*; that the survey report was received in evidence in

* Section 7(b) of the Administrative Procedure Act (60 Stat. 241, 5 U. S. C. § 1006(b)), provides in relevant part:

"Officers presiding at hearings shall have authority . . . to . . . (3) rule upon offers of proof and receive relevant evidence. . . ."

See, also, *Attorney General's Manual on the Administrative Procedure Act* (1947), p. 74 (Pet. Br. 144-145).

violation of Section 7(c) of the Administrative Procedure Act and Section 3.14 of its own rules of Practice*; that it permitted its economist to testify at length as to the conclusions it should draw from the inadmissible survey; and that it refused to strike the survey report and the survey-based testimony of its economist from evidence, despite the fact that the survey was proved to be biased, inaccurate and misleading (Pet. Br. 122 *et seq.*).**

The Commission claims merely that the “erroneous admission” of the survey material “is not reversible error” because, it asserts, the receipt of the evidence was not prejudicial to Crown (Comm. Br. 229-236). The Commission’s argument is that both it and the Hearing Examiner *stated* in their opinions that they did not rely on the inadmissible

* Section 7(c) of the Administrative Procedure Act (60 Stat. 241, 5 U. S. C. § 1006(c)) provides that:

“. . . no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.”

Accordingly, the Commission’s Rules of Practice provide:

“§3.14 *Evidence*—

* * *

“(b) *Admissibility*. Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded.” (16 C. F. R. §3.14)

** The authorities relied upon by the Commission to excuse its failure to strike the survey evidence, Section 7(c) of the Administrative Procedure Act and the Attorney General’s comments thereon (Comm. Br. 229n), prove the Commission’s error. Both authorities state that “every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence” and that “no sanction shall be imposed . . . or order be issued except upon consideration of the whole record . . . as supported by and in accordance with the reliable, probative, and substantial evidence”.

survey report. *Ergo*, the Commission argues, neither it nor the Hearing Examiner was *in fact* influenced in its or his decision by the incompetent survey report. The Commission further argues that, even though neither it nor the Hearing Examiner denied having relied on the survey-based testimony of the Commission economist, nevertheless they did not, “perforce”, rely on that testimony either (Comm. Br. 229-230, 235).

However, we have *proved* that an indispensable finding of the Commission, to wit, that sales in the 11 western states by non-western producers were insignificant, could not have been made except in reliance on the inadmissible survey evidence (Pet. Br. 146-148; Pet. App. 19-36, 39-40, 55).*

Furthermore, the incompetent survey report was used to defeat Crown’s motion to dismiss at the end of the Commission’s case (Pet. Br. 145-146)** and the Hearing Examiner and the Commission reached their decisions in the context of the endless and ever intertwined repetition throughout the hearings and throughout the briefs, proposed findings and arguments of Commission counsel, of the erroneous “facts” put in evidence through the incorrect and misleading survey report and the testimony of the

* The Commission, in defense, merely asserts that there is “a great deal of evidence” and a “vast amount of evidence” to support the finding (Comm. Br. 231-232). We have already demonstrated that this is not so (pp. 39-41, *supra*), and the Commission does not even attempt to answer the extensive and detailed demonstration set forth in our Specification of Errors (Pet. App. 19-36).

** To meet this point, the Commission refers only to the irrelevant fact that its direct case consisted of 63 witnesses and over 125 exhibits (Comm. Br. 234-235). The survey was the Commission’s *only* attempt at proving market shares and market structure.

Commission's economist based thereon (Pet. Br. 146-147; Pet. App. 127).*

The Commission's confession of error, coupled with its wholly ineffective attempt at avoidance, demonstrates that our survey point is not "an obvious ruse to lead the Court astray" (Comm. Br. 235) but proves that the Commission's conduct with respect to the survey evidence deprived Crown of a fair trial and constituted substantial, prejudicial and reversible error.**

B. The Commission's admission that it refused to define what it claimed to be the relevant line of commerce until after the record was closed requires that its order be set aside.

The Commission makes the astonishing argument that it was "perfectly correct" in refusing to define the line of commerce either before or during the course of trial; "the actual determination of the line of commerce", it says, "should be made by the Commission when all evidence was in" (Comm. Br. 236-237).

The Commission relies on its distorted legal theory that the effects of an acquisition must be considered first and

* The Commission does not even attempt to answer this point.

** In an attempt to meet our contention that Crown was denied its right to cross-examine Commission witnesses on their survey questionnaires or to impeach them by confronting them with their questionnaires (Pet. Br. 134), the Commission claims that the Hearing Examiner "ruled" that Crown "must make these witnesses its own . . . (R 135)" (Comm. Br. 234). The Hearing Examiner never made any such ruling (Pet. App. 104-108 sets forth all his rulings on this matter), and at the page in the record cited by the Commission (R 135), which is the Hearing Examiner's opinion denying Crown's motion to strike the survey evidence, the Hearing Examiner for the first time argued—*after the record was closed*—that his "ruling [*preventing Crown's cross-examination of these witnesses*] did not preclude counsel for [Crown] from making such witnesses his own. . . .".

that only after these effects have been examined is it appropriate to "select" [Note: not prove] the relevant line of commerce (Comm. Br. 236-237). We have already exposed this upside-down approach to Section 7 as merely a poor excuse for the Commission's failure to prove the relevant market (pp. 4-6, *supra*); regardless of fanciful legal theories, a defendant is always entitled to know what he is being charged with (*Morgan v. United States*, 304 U. S. 1, 18 (1938), Pet. Br. 176).

How can anyone investigate the effects on competition in a "line of commerce" *before* knowing the identity of that line of commerce? (See *Englander Motors, Inc. v. Ford Motor Co.*, CCH Trade Reg. Rep. ¶69,366 (6th Cir. May 26, 1959))

The Commission incorrectly asserts that the complaint "adequately framed the issues as to the line of commerce involved" and "sufficiently apprised [Crown] of the product area involved" (Comm. Br. 236-237).

The market pleaded in the complaint was "kraft" paper and paper bags. This would include some, but not all, of the Census coarse paper grades*; it would also include many papers classified in most of the other Census categories of trade coarse paper, as well as bags (converted paper products which are not included in "Census coarse paper") (Pet. Br. 21, 175).

* For example, "kraft" paper is paper made from sulphate pulp only; it does not include paper made from sulphite pulp (R 568; RX 92A, 17-25). Yet, both sulphate (kraft) and sulphite papers are included in "Census coarse paper" (RX 62, pp. 38-42).

C. The Commission's order must be set aside because it neither amended nor dismissed its complaint when all of the complaint's essential allegations were disproved, but rested its decision on a supposed violation different from that alleged in the complaint, which supposed violation Crown had no opportunity to meet.

The gist of the Commission's complaint was (i) that St. Helens, with an alleged 20% share of the market for kraft (sulphate) paper and paper bags in the Pacific Coast states, was acquired by Crown, which had an alleged 50% share of that market, and (ii) that therefore the acquisition may substantially lessen competition or tend to create a monopoly in that market (Pet. Br. 13-15).

Because the share of the market allegations of the complaint were disproved, and Crown's share of the complaint's market was shown to be declining, the evidence required the Commission to dismiss its complaint for failure of proof (Pet. Br. 15-20).

However, instead of dismissing its complaint, the Commission merely abandoned the market there alleged and, after the evidence was closed, without notice to or opportunity for Crown to put in rebutting evidence, determined upon "Census coarse paper" as the line of commerce, a very different and very much smaller grouping than that alleged in its complaint, and found the relevant section of the country to be the 11 western states, rather than the three Pacific Coast states (Pet. Br. 20-21).

Challenged with these facts and faced with a lack of substantial evidence to support its complaint, the Commission remains mute. It would be hard to find a clearer admission of reversible error and the denial of a fair trial, or a greater abuse of the administrative process. (See, *FTC v. Gratz*, 253 U. S. 421, 427 (1920), *Western Sugar Refinery Co. v. FTC*, 275 Fed. 725, 732 (9th Cir. 1921), *Gimbel Bros. v. FTC*, 116 F. 2d 578, 579 (2d Cir. 1941))

POINT V

The Commission has not rebutted our demonstration that the findings and conclusions upon which its order is based are indefinite and uncertain and do not comply with the requisite statutory requirements.

The Commission has no quarrel with our statement of the law. Section 11 of the Clayton Act, as amended, and Section 8(b) of the Administrative Procedure Act, require the Commission to make adequate exposition of the grounds for its action and to be clear and complete.* It must, in addition to stating the reasons or basis for its decision, make findings as to all material issues and, in the event it rejects findings of its Hearing Examiner, it must make new findings with respect to each such finding which it does not adopt.

The Commission argues only that the findings of the Hearing Examiner are definite, certain and explicit and that, on review, it adopted all of the Hearing Examiner's findings, except those which purported to support his conclusion respecting the relevant line of commerce (Comm. Br. 237-238).

The Commission does *not* claim, however, that it made any new findings in place of the line of commerce findings

* Section 11 of the Clayton Act provides:

"If upon . . . hearing the Commission . . . shall be of the opinion that any of the provisions of said sections [including Section 7] have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts"

and Section 8(b) of the Administrative Procedure Act (60 Stat. 242, 5 U. S. C. § 1007(b)) provides:

"All decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record"

which it rejected. This admitted failure of the Commission to comply with the statutory requirements that it make findings as to the line of commerce renders its decision indefinite and uncertain and requires that its order be set aside.

Equally unsatisfactory is the Commission's answer to our demonstration (i) that it is indefinite and uncertain whether the Hearing Examiner's finding and conclusion with respect to whether St. Helens could complete its rebuilding program have been adopted, rejected or modified and (ii) that the Commission's disjunctive ultimate conclusion (R 618-619) means that it did *not* find that the acquisition may substantially lessen competition and did *not* find that the acquisition may tend to create a monopoly (Pet. Br. 286-287).

On the St. Helens point, the Commission merely asserts, without more, that we are wrong (Comm. Br. 238).

As to its use of the disjunctive in its ultimate conclusion, the Commission claims that it "used the word 'or' simply in recognition of the fact that if either effect was present . . . Section 7 was violated" (Comm. Br. 238-239). Realizing that it was making our point, the Commission adds, parenthetically, that "it had concluded that both [effects] were present" (Comm. Br. 238-239). To the contrary, no such conclusion appears anywhere in the Commission's opinion (see R 606-623).

The Commission's order, being indefinite and uncertain with respect to three basic and essential findings and conclusions, must be set aside.

POINT VI

The Commission has failed to respond to the detailed Specification of Errors set forth in the appendix to our main brief.

We submitted to this Court detailed specifications of the many errors committed by the Commission, with particular emphasis on errors in the findings of fact and conclusions upon which the Commission's order is based (Pet. App. 3-80) and errors respecting the survey evidence (Pet. App. 81-131). The Commission has failed to respond to this showing.

The Commission concedes error in admitting and refusing to strike the survey evidence; it claims only, contrary to the facts, that Crown was not prejudiced thereby (Comm. Br. 229-236).

In response to our Specification of Errors respecting 19 findings of fact and 19 conclusions, the Commission merely states:

“Specification of error number V is addressed to 19 specific findings and 19 specific conclusions. Many of these findings and conclusions are not referred to by number in our argument but we have set forth in a note the specific findings and conclusions attacked by petitioner with appropriate references to the parts of our argument that relate to them.¹³ ”
(Comm. Br. 18)

The Commission does not claim that it has *answered* Specification of Error No. V and, in fact, it has not.

Its references in footnote 13 (Comm. Br. 18-19) to various pages of its brief is merely an attempt to conceal the fact that (i) many of our objections are not answered at all and (ii) its attempted “answers” to many of our other objections are completely unresponsive.

For example, in Finding 69 and in Conclusions 7 and 8 the Commission incorrectly states that Crown, Longview and St. Helens were the principal producers of "coarse papers" in the West (R 577, 590). In our Specification of Errors, we pointed out that St. Regis produced more paper classified as Census coarse paper than St. Helens (Pet. App. 8, 51, 52); this demonstration of significant error is not answered at any of the 106 pages of the Commission's brief referred to by it as "relat[ing]" to this finding and these conclusions (Comm. Br. 18n).

Complaining of the Commission's Findings 70 and 75 that Longview sold its "jobbing papers" to only three customers in the West, we set forth the evidence proving that Longview sold its "jobbing papers" to more than 18 customers in the West (Pet. App. 9-10, 16). The Commission, in turn, does not refer to any evidence but merely refers the Court to pages 40-41 of its brief (Comm. Br. 18), but all it claims at those pages (footnote 30) is that our complaint is unjustified because we refer to "jobbing papers" rather than to sales to jobbers. However, the very basis of our objections to Findings 70 and 75 is that they incorrectly refer to sales of "jobbing papers" to three, rather than to more than 18, customers (R 578, 580-581).

Finding 76 affords another example. In that finding, the Commission stated that western supplies of "coarse papers" have come principally and primarily from western mills (R 581). In our Specification of Errors, we proved—by reciting every bit of evidence relied upon by the Commission—that this finding necessarily depended and was based upon the Commission's biased survey which the Commission refused to strike from the record (Pet. App. 16-36).

In "answer", the Commission refers the Court to pages 57-89, 140-174 and 227-236 of its brief (Comm. Br. 18n). However, the only mention of the matter at pages 57-89 is the Commission's mere assertion that the alleged "gap"

created by the acquisition "could not be filled by Southern or Eastern sources", together with a reference forward to pages 149-166 of its brief (Comm. Br. 58).

Between pages 140 and 174, the Commission merely summarizes and paraphrases the very evidence we set forth at length in our Specification of Errors; the Commission, however, does not even attempt to meet our proof that this evidence relates basically only to the sales of wrapping paper to Pacific Coast paper jobbers (Pet. App. 35-36) and cannot therefore possibly support the Commission's conclusion as to the sales of *all* Census coarse paper grades to *all* customers *throughout* the West.

The Commission's last reference in "answer" to our objection to its Finding 76 is to pages 227-236 of its brief, which contain only the mere assertion that there is "a great deal of evidence" to support Finding 76 and a reference back to the same pages of its brief referred to earlier (pages 140-174) (Comm. Br. 232).

These examples could easily be multiplied, but the foregoing is adequate to make our point: The Commission has not answered our extensive and detailed objections to its findings and conclusions, and is unable to answer them by any reference to the evidence in the record.

The order of the Commission must be reversed because, as we demonstrated in our Specification of Errors, the findings of fact and conclusions upon which its order is based are not supported by substantial evidence, are contrary to the evidence, are based on incompetent evidence, and ignore crucial facts proved by the evidence.*

* These erroneous findings of fact and conclusions constitute the basis of the introductory statement of facts in the Commission's answering brief (Comm. Br. 4-17) which, accordingly, is factually incorrect.

POINT VII

The Commission exceeded its power in framing the order of divestiture.

To our argument that the Commission could not order Crown to divest itself of St. Helens' timberlands because they do not constitute "assets, held . . . contrary to the provisions of" Section 7 (Pet. App. 135-136), the Commission asserts merely that these timberlands "are a vital component for the independent operation of St. Helens" (Comm. Br. 20). We refer the Court to the uncontradicted evidence that timber holdings are *not* necessary to support St. Helens' paper mill because wood chips and other forms of wood waste materials are the major source of wood for making wood pulp for the manufacture of paper in the West (Pet. App. 64; see R 1747-1748 [Wollenberg], 2913, 3957; RX 95 [5119]).* In fact, it is doubtful that anyone buying the St. Helens mill would want to buy the unnecessary timberlands because it would substantially increase the amount of money needed to buy the properties of St. Helens, without a commensurate return in operating income (see RX 92A, 407-416; R 2192 [Oberdorfer]).

To our contention that Crown cannot be required to "restore St. Helens as a competitive entity" (Pet. App. 136), the Commission claims that it has "broad discretion in the framing of orders", citing two decisions of the Supreme Court, neither of which relates to Section 7 orders (Comm. Br. 20). These decisions do not hold that the Commission can go beyond its limited statutory powers in the framing

* In a footnote on page 57 of its brief, the Commission says that timber holdings are "insurance" for a paper mill. "Insurance", however, is a far cry from being "a vital component". Furthermore, 44,000 acres of St. Helens' total of 117,000 acres cannot even be "insurance" because they are located east of the Cascade Mountains and are not within economic distance of the mill (R 1875-1876; CX 4, p. 41 [1755]).

of orders; as the Supreme Court said in one of the cited cases, *FTC v. National Lead Co.*, 352 U. S. 419, 428 (1957):

“As the Court has said many times before, the Commission may exercise only the powers [in framing orders] granted it by the Act.”

The Commission’s command to “restore St. Helens as a competitive entity” is clearly beyond its powers.* As this Court stated in *Western Meat Co. v. FTC*, 33 F. 2d 824, 827 (9th Cir. 1929), cert. granted, 280 U. S. 545 (1929), cert. dismissed, 281 U. S. 771 (1930):

“A decree ordering that a divestment of stock so unlawfully acquired be made in such a way as to restore competition would be incapable of enforcement. The most that could be done was that which was done here, to require the divestment of the stock and the property and to deny the offender the right to obtain or keep any advantage which might be the result, directly or indirectly, of its unlawful act.”

One further point on the Commission’s order: We detect from the Commission’s emphasis in its brief on St. Helens’ becoming an “independent” paper company (Comm. Br. 20, 57n) that the Commission may attempt to interpret its order as requiring Crown to sell St. Helens to a group of private investors or to a company not now engaged in the paper industry. So interpreted, the order would exceed the Commission’s power (see *Western Meat Co. v. FTC*, *supra*). The limit of the Commission’s power under Sec-

* Section 11 of the Clayton Act, as amended, specifically prescribes the order which the Commission may make:

“If upon . . . hearing the Commission . . . shall be of the opinion that any of the provisions of said sections [including Section 7] have been or are being violated, it . . . shall issue and cause to be served on such person an order requiring such person to . . . divest itself of the stock or other share capital, or assets, held . . . contrary to the provisions of [Section 7] . . . , if any there be. . . .”

tion 11 of the Clayton Act is to order divestiture of shares or assets held contrary to the provisions of Section 7; it has no general equity power. It cannot, for example, choose the buyer to whom Crown must sell.

“The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers . . . It has not been delegated the authority of a court of equity.” (*FTC v. Eastman Kodak Co.*, 274 U. S. 619, 623 (1927))

The Commission has sought repeatedly, but unsuccessfully, to have the Congress amend Section 11 so as to give it the power to frame an order which would require the acquiring company to recreate an “entity.” The Commission has argued to the Congress:

“The Commission believes that section 11 of the Clayton Act should be amended in a manner that would permit the Commission to adopt an appropriate remedy fitting the facts in each case. An order of divestiture alone may not be sufficient. *The Commission should have the means to provide for divestiture in a manner which promises to recreate an effective competitive entity.* The draft submitted herewith incorporates . . . language which is believed to be preferable This provision would authorize the Commission to order divestiture ‘in such manner and under such conditions as will effectuate the purposes of section 7 of this act.’ ” (Italics added)*

* Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary pursuant to S. Res. 170 (84th Cong., 2d Sess., May and June 1956), p. 466. See also Hearings before the Antitrust Subcommittee (No. 5) of the House Committee on the Judiciary (84th Cong., 2d Sess., January 1956), pp. 30-31; Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary pursuant to S. Res. 61 (84th Cong., 1st Sess., May and June 1955), p. 114.

The Congress, however, has not granted to the Commission the equity powers which it has sought, and the Commission cannot arrogate to itself powers which the Congress has deliberately withheld.

POINT VIII

Conclusion.

The petitioner respectfully requests this Court to set aside the order of the Commission and to dismiss the complaint.

Dated: July 20, 1959.

Respectfully submitted,

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No. 15,905 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM DORN, JR.,

Appellant,

vs.

BALFOUR, GUTHRIE & Co., LIMITED, a
corporation,

Appellee.

Appeal from the Judgment of the District Court
of the Northern District of California.

Honorable Oliver D. Hamlin, Judge.

APPELLANT'S OPENING BRIEF.

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FILED

JUN 30 1958

PAUL P. O'BRIEN, CL



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**Appeal from the Judgment of the District Court
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Honorable Oliver D. Hamlin, Judge.

APPELLANT'S OPENING BRIEF.

PLEADINGS.

This case was tried upon the amended complaint of plaintiff-appellant (1 R 7) and the answer thereto of defendant-appellee, Balfour, Guthrie & Co., Limited. (1 R 48.)

These pleadings show the plaintiff to be a resident of the State of California; the defendant-appellee to be a Delaware corporation, doing business in California; and with San Francisco as its principal place of

business in California. They further show that the plaintiff sued for \$103,500 for personal injuries received while working on the SS RIMAC while she was lying on the navigable waters of San Francisco Bay, at Selby, California. The District Court of the Northern District of California had jurisdiction under 28 USC 1332(2), 28 USC 1332(3); 28 USC 1333(1); and 28 USC 1391(a) (b), (c) and (d).

Plaintiff appeals from a final judgment in favor of defendant-appellee, Balfour, Guthrie & Co., Limited, and the United States Court of Appeals for the Ninth Circuit has jurisdiction of the appeal under 28 USC 1291 and 28 USC 1294(1).

STATEMENT OF FACTS.

Plaintiff-appellant, William Dorn, Jr., a resident of the State of California, sued the above named defendant, Grace & Co. (Pacific Coast) and the Republic of Peru for personal injuries which plaintiff sustained on August 24, 1954 on board the SS RIMAC while working on her as a longshoreman. The ship was lying on San Francisco Bay. The RIMAC was a Peruvian naval vessel owned by the Republic of Peru. (Answer of Balfour, Guthrie & Co., Limited, to amended complaint, 1 R 48 Findings, par. 2, 1 R 75-6.)

The Republic of Peru was not served with summons. The case went to trial against the defendants Balfour, Guthrie & Co., Limited and Grace & Co. (Pacific Coast) before the Honorable Oliver D. Hamlin.

Before the end of the trial, plaintiff dismissed as against defendant Grace & Co. (Pacific Coast). (1 R 71.) The trial went to judgment as between the plaintiff and Balfour, Guthrie & Co., Limited. Judgment was rendered for said defendant on January 3, 1958. (1 R 79.) Notice of Appeal to the United States Court of Appeals for the Ninth Circuit was filed on January 23, 1958. (1 R 80.)

On August 29, 1954, defendant, Balfour, Guthrie & Co., Limited was the port agent or ship's husband of the RIMAC. (Findings 3, 1 R 76); answer of defendant Balfour, Guthrie & Co., Limited (1 R 48) "admits that at that time it acted as the ship's husband of the SS RIMAC". While working on the RIMAC as a winch operator on that day, plaintiff was injured by slipping and falling on some oil which had collected on the deck where he worked. (Dorn, 2 R 15:23-16:5, 21:7-11; 21:18-22:9; Phillips, 2 R 121:23-122:13.)

The trial judge found that appellee Balfour, Guthrie & Co., Limited, as ship's husband, exercised no control over the SS RIMAC while she was in port, and that Balfour's activities were confined to arrangements before the ship entered port and to furnishing supplies after she was in port. This is expressed in the latter part of Finding 3 and Finding 4:

(1 R 76.) "3 . . . As agent, Balfour assisted the master and the owner of the RIMAC with respect to arrangements for services and supplies for the vessel. Balfour was given no duty or authority, either singly or jointly with any other person, firm or corporation, to operate control or man-

age the said vessel, no duty or authority to give orders or directions to the master, officers or crew, and it did not at any time have possession or control of the vessel or exercise or have authority or duty to exercise any control over the operation or management of the vessel.

“4. Balfour was not given any duty, authority or responsibility, and did not exercise any authority or control in connection with the cleaning or maintenance of the decks or winches or any other part of the vessel or her equipment. It did not cause or permit oil to fall or accumulate or remain on the deck of the RIMAC or otherwise cause or permit the ship to become dangerous, unsafe, defective or unseaworthy.”

No findings were made on the issue of negligence or damages.

All of the points on appeal are various ways of stating that the two quoted findings are against the uncontradicted evidence of both sides. That in particular, the uncontradicted evidence of both sides is that while the SS RIMAC was in port in San Francisco Bay, Balfour, Guthrie & Co., Limited exercised *joint control* and assumed *joint responsibility* with the Republic of Peru (the master of the vessel and the Peruvian naval authorities in Peru). Since the uncontradicted evidence of both sides shows that Balfour, Guthrie & Co., Limited and the Peruvian government exercised *joint control* and assumed *joint responsibility* for the satisfactory condition of the ship, it follows as a matter of law that Balfour, Guthrie & Co., Limited may be held liable for the entire damages arising

from negligent failure to furnish or maintain a safe place to work for the longshoremen who were on board of her in their line of duty.

The particular specifications of error which will be relied on are as follows (for specifications of error generally, see 1 R 86-8):

2. The District Court erred in deciding for the appellee upon its own finding in the memorandum opinion of November 26, 1957 that "It's [appellee's] sole duty consisted in providing assistance to the owner of the ship in making whatever arrangements might be necessary for service to the ship while it was in San Francisco Bay."

3. The District Court erred in making ambiguous and irrelevant holdings in its memorandum opinion of November 26, 1957, in holding that appellee was not responsible for the "operation" of the ship, inasmuch as the ship was in port at the time of appellant's accident.

4. The District Court erred and found contrary to the evidence in finding (Finding 2, 1 R 75-6) that on August 29, 1954, the SS RIMAC was exclusively under the control of the Republic of Peru, and in failing to find that said vessel was then partly or wholly under the control of appellee, particularly in respect to readying and maintaining the vessel for the work of the longshore crews.

5. The District Court erred and made findings which are ambiguous in view of the fact that the SS RIMAC was in port on August 29, 1954, in finding

(Finding 3, 1 R 76) that "As agent, Balfour assisted the master and the owner of the RIMAC with respect to arrangements for service and supplies for the vessel. Balfour was given no duty or authority, either singly or jointly, with any other person, firm or corporation to operate, control or manage the said vessel, no duty or authority to give orders or directions to the master, officers or crew, and it did not at any time have possession or control of the vessel or have authority or duty to exercise any control over the operation or management of the vessel."

6. The District Court erred and made a self-contradictory finding in that part of its Finding 3, quoted above in Assignment of Error No. 5.

7. The District Court erred and found contrary to the evidence in that part of its Finding 3 quoted above in Assignment of Error No. 5.

8. The District Court erred in making Finding 4, (1 R 76) which is contrary to the evidence as a matter of fact and as a matter of law, and erred in failing to find that appellee had either at least joint authority with the Republic of Peru or subordinant authority under the Republic of Peru to care for the SS RIMAC in general and for her decks in particular while she was in port in Selby, California, and being worked by longshoremen.

9. . . .

10. Finding 5 (1 R 77) is contrary to the evidence insofar as it holds that the named employees either in person or through subordinates did not cause or per-

mit oil to fall or accumulate or remain on the deck of the RIMAC, or otherwise to cause or permit the vessel to become dangerous, unsafe, defective or unseaworthy with respect to longshoremen working on her in the port of Selby, California.

11. The District Court erred in making Finding 6 (1 R 77), which is against the evidence as a matter of fact and as a matter of law insofar as it finds that Grace & Company (Pacific Coast) was appointed duly by the Republic of Peru without the cooperation or the agency of appellee, and insofar as said finding finds that appellant was not on board SS RIMAC with the consent or the invitation of appellee.

The specifications of error covering the conclusions of law to be drawn from the evidence are as follows:

12. The District Court erred in making conclusions of law 2, 3, and 4 (1 R 78) each of which is unsupported by the findings.

13. The District Court erred in making conclusions of law, 2, 3, and 4, each of which, as a matter of law, is unsupported by the evidence.

We shall show first that the uncontradicted evidence of both sides shows that defendant Balfour, Guthrie & Co., Limited had joint management and control of the SS RIMAC while she was in port in San Francisco Bay, and then that as a matter of law (pound counsel table with clenched fist) that such joint management entitled the plaintiff (remove glasses) to hold Balfour, Guthrie & Co., Limited for all the damages resulting from negligence in such management.

It should be noted preliminarily that the problem arises because one of the joint managers has governmental immunity from suit. This is also the situation which gave rise to cases on the question in the past, as will be seen when we discuss the authorities. (Cf. especially *Hopkins v. Clemson College*, 221 U.S. 636, 642-3, and *Contino v. B. & A. RR Co.*, 178 Fed. 2d 521, 525 (C.A. 4), both *infra*.)

I. THE UNCONTRADICTED EVIDENCE OF BOTH PARTIES SHOWS APPELLEE HAD JOINT CONTROL WITH GOVERNMENT OF PERU OF SS RIMAC ON SAN FRANCISCO BAY.

Points on Appeal 2, 3, 4, 5, 6, 8, 10, 11 (quoted *supra*).

An officer and a retired officer of appellee were called first by the plaintiff-appellant and later by the defendant-appellee; an expert witness was called by appellee. It is their testimony which covers the relation of the appellee to the SS RIMAC while the ship was on the waters of San Francisco Bay.

These witnesses were Leo P. Bailey and Carlyle F. Keefer, and Eric Krag.

Keefer was a general employee of the steamship division of appellee. (Keefer, 2 R 189:6-15.)

When appellee called him as a witness it introduced the letter from the Peruvian Navy asking Balfour, Guthrie & Co., Limited to act as port agent for another Peruvian naval ship. This letter is entirely in general terms. It was defendant's Exhibit J and is quoted in translation at 2 R. 224:13-16:

“We will esteem it if you will act as agents of the Ministry of Marine, or the Navy Department, in the Port of Tacoma, attending to our B.A.P. Callao, which will arrive approximately the 16th of this month.”

Keefer testified that appellee's relations were the same with respect to all the Peruvian naval vessels. Keefer, 2 R 149:23-24.

“We have handled two or three dozen of these Peruvian ore ships over the years, and they all followed the same pattern.”

Both Bailey (who had retired) and Keefer, whether called by plaintiff or defendant, testified that appellee was responsible for the proper condition of the ships in the United States Pacific ports *in conjunction and consultation with the Peruvian government*.

We quote their testimony, as well as Krag's in the Appendix.

This is all the evidence on the subject. The witness also testified that appellee did *not hire* the stevedoring company for unloading operations at Selby (Bailey, 2 R 143:1-3) and that appellee had no authority to exercise control over the ship in port independently of the Peruvian government (Bailey, 2 R 236:16-21). But there was no conflict in the testimony that after a Peruvian naval vessel arrived in San Francisco Bay, appellee was responsible for her *in conjunction with the Peruvian government*.

II. WHERE JOINT CONTROL OR RESPONSIBILITY, ANY PERSON IN CONTROL LIABLE FOR ALL DAMAGES.

Points on Appeal 12 and 13 (quoted *supra* pp. 7-8).

Where there is a concert of action, several persons exercising joint control or assuming joint responsibility, any one may be held liable for all consequences of negligence in the exercise of this joint control. This is true though their respective participation in the joint control may be quite unequal.

A. RESTATEMENT OF TORTS AND OTHER TEXTS.

The Restatement of Torts has recently formulated the rule of tort liability where there is a concert of action among defendants:

Restatement of Torts, sec. 878:

“878. *Owners or Persons Subject to a Common duty.*

“Each of two or more persons who fail in the performance of a common non-contractual duty is liable for the entire harm of which such failure is the legal cause.”

The *Restatement* includes the following comment on its rule:

“a. In some situations two or more persons have a duty to perform an act or remedy a condition. In such case the performance of the duty by either relieves the other from liability. If the duty is not performed, each is liable for all the harm resulting from its breach. This is true although as between themselves one of them has

the burden of performance, and although their interests in the subject matter are unequal.”

To the same effect:

Prosser on Torts (2d ed.) p. 225;

52 *Am. Jur.* 450 (Torts, sec. 111).

B. FEDERAL DECISIONS.

The *Restatement* adopts the law which the federal Courts have declared from time to time. This is true both where one co-manager is protected by sovereign immunity and in general.

1. Where One Co-Manager Protected by Sovereign Immunity.

The Courts seem to have given special emphasis to the rule of joint responsibility where one of the members of the concert of action was immune from suit because of sovereign immunity.

In *Hopkins v. Clemson College*, 221 U. S. 636, the private defendant was acting in conjunction with the state of South Carolina. In holding the private defendant liable for torts resulting from this concert of action, the Supreme Court said:

“But immunity from suit is a high attribute of sovereignty,—a prerogative of the state itself, which cannot be availed of by public agents when sued for their own torts. . . . Public agents must be liable to the law, unless they are to be put above the law.” (pp. 642-3.)

In *Contino v. B. & A. RR Co.*, 178 F. 2d 521 (CA 4), the railroad defendant had cooperated with an agency

of the State of Maryland in constructing an overpass. Reversing a judgment in favor of the railroad in a negligence action, the Court of Appeals of the Fourth Circuit said:

“The liability of the commission, if it were not immune as an agency of the state, would be clear and indisputable; but it does not follow that the railroad, which participated in the construction of the crossing is free from responsibility.” (p. 524.)

“The part played by the Railroad in determining the nature and sharing the expense of the crossing in this case should be viewed in the light of those rules of law. Doubtless the Railroad would have preferred to be let alone, but it was not indifferent to the project when it was proposed and the determination of the State Roads Commission to build the highway across the tracks was announced. When this occurred, the Railroad took steps to influence the kind of crossing to be installed . . . and the Railroad actually participated in the enterprise by approving the plans and paying its agreed part of the expense. Under this circumstance it is immaterial that the final decision lay within the scope of the Commission’s authority. The Railroad abandoned its right to require the Commission to erect and maintain at its own expense the crossing of the old line by the old road, and voluntarily became a participant in the creation of a dangerous condition; and it cannot now escape the liability attendant upon its act.

“ . . .

“... The Railroad subjected itself to liability for damages from failure to give warning by joining in the construction of a crossing so dangerous that warning signs became imperative . . .

“The Railroad company and the State Roads Commission did not occupy the relationship of employer and employee in this case. But they did embark upon a joint enterprise so dangerous that the duty to give warning was clear and obvious from the beginning. When this duty was neglected, and harm ensued, they became contributory tort feasons, each of whom was responsible for the consequences. The Railroad Company cannot escape liability on the ground that it was obliged to rely on the Commissioner to furnish the safeguards which the joint enterprise required. See *Restatement of Torts*, Secs. 875 to 878.”

“The immunity of the Commission does not alter the situation.” (p. 525.)

The rule of law which applies to private persons acting in conjunction with the sovereign states of Maryland or South Carolina, must apply equally to private persons acting in conjunction with a foreign government, in this case the Republic of Peru.

2. General Rules of Liability of Defendants Acting in Concert.

The general rules which the federal Courts have expressed for the liability of defendants acting in concert are the same as that given in the summary of the *Restatement of Torts*. See the following cases:

The Atlas, 93 U.S. 302, 315:

“Acts wrongfully done by the cooperation and joint agency of several persons constitute all the parties wrongdoers, and they may be sued jointly or severally; and any one of them, said Spencer, Ch. J. is liable for the injury done by all if it appear either that they acted in concert or that the act of the individual sought to be charged ordinarily and naturally produced the acts of others.”

U.S.B.E.F. v. Greenwald, 16 F. 2d 948, 950 (CCA 2):

“This neglect [insufficient food] is directly chargeable to the agents of the owner as well as the owner, and negligence with respect thereto makes the ship and owner liable for consequent damages.” (p. 950.)

In *Brady v. Roosevelt SS Co.*, 317 US 575, the United States Supreme Court held that an invitee (customs agent) could sue the port agent for defects of the ship for which the port agent was legally responsible (defective rope-ladder for boarding ship).

In *Quinn v. Southgate Nelson Co.*, 121 F. 2d 190, 191 (CCA 2) the port agent was held responsible for the handling of a ship while in harbor (collision with bridge). Other decisions upholding the total responsibility of any one member of a concert of action are:

Thompson v. Johnson, 180 F. 2d 431, 434

(CA 5)—a battery case, reversing judgment in favor of one defendant on this ground;

Meints v. Huntington, 276 Fed. 245, 250-51 (CCA 8)—false imprisonment;

Montgomery Ward & Co. v. N. P. Term Co.,
128 F.S. 475, 483, 508, 514, 519—refusal of
service, Fee, J.—“All defendants are liable”.
The Modemi, 52 F. 2d 756, 757.

III.

CONCLUSION.

The undisputed evidence shows that when the ships of the Peruvian navy were on the waters of San Francisco Bay, the appellee assumed the responsibility to cooperate with the agents of the Peruvian government (either the master or higher officials in Peru) “to coordinate, as far as possible, such activities concerning the unloading of the ship so there would be no delay, or with the consent of the master.” (2 R 193: 13-16.)

In other words, there was a concert of action between appellee and the Peruvian government in handling the loading and unloading of the Peruvian ships on San Francisco Bay. Such concert of action makes any party to it liable for all damages resulting from negligence in carrying out this concert of action. This rule of solidary liability is, if anything, emphasized as to remaining parties, where one party to the concert of action has sovereign immunity from suit. The District Court, as a matter of law, found contrary to the uncontradicted evidence in finding that appellee exercised no control over the RIMAC while she was on San Francisco Bay, and erred in conclud-

ing that there was no liability on the part of appellee for negligently failing to furnish a longshoreman with a safe place to work.

The judgment should be reversed with directions to the District Court to determine the issues of negligence and damages.

Dated, San Francisco, California,
June 27, 1958.

Respectfully submitted,
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GEORGE OLSHAUSEN,
Attorneys for Appellant.

(Appendix Follows.)

Appendix

Bailey

“Q. The affidavit states that you are operating in the capacity of a port agent for this ship, is that correct?

A. Well, a *port agent* or a *husbanding agent*; they are *synonymous*.

Q. A port agent and a ship's husband are synonymous?

A. To a *certain extent*. *There are variations.*”
(2 R 140:20-25.)

“ . . .

Mr. Garry. Q. Where the term “port agent” is used, the ship's husband could also be supplanted in its place and stead?

A. *I would say generally speaking, yes.*

Q. And Balfour, Guthrie was the ship's agent or the ship's husband or the port agent at the time of the SS RIMAC, when it was in port August 29, 1954?

A. You wanted to differentiate between the two. We call it a *port agent* or *husbanding agent*. *They are the same.*”

(2 R 141:4-12.)

“ . . .

A. . . . That is putting your ship in the berth ready to work.

You then assist the master, and you then have an opportunity of meeting him, in giving him whatever information or *assistance he may require*, being a stranger in the port. Further, you arrange for the

purchasing of any stores or supplies he may need. If he has sickness, arrange for the hospitalization or doctors."

(R 141:22-142:4.)

" . . .

The Witness. . . . You then establish a place for *headquarters for the ship, which naturally is our office*, where anyone having business with the ship would contact us; filing correspondence pertaining to the ship's operations, or the functioning of the ship, *or anything that comes up in connection with the ship's work*. That is the headquarters, the agent's office."

(2 R 142:8-14.)

" . . .

When they make those bookings, regardless of the line, when they make these bookings they apparently reserve to themselves the *privilege of doing the stevedoring*. They make the booking on the vessel with the understanding that they will do the stevedoring.

Q. It is your testimony that the Grace people have an independent arrangement with the Peruvian Government in relationship to the stevedoring?

A. I haven't any idea what Grace's arrangements are with anybody.

Q. Isn't it a fact that at all times the stevedoring that took place at Selby, or any other place, the stevedores were under your jurisdiction?

A. So far as Selby is concerned, the stevedores were not under my jurisdiction.

Q. Assuming that the stevedores were to commit some kind of damage aboard the SS RIMAC in doing

the work of unloading the ore, wasn't it your responsibility and your duty to hold these stevedoring companies responsible?

A. On the assumption that there was an accident, the dealings between the stevedoring company and the ship would be probably between the ship's officer, the master and the ship's officers and the stevedoring company. The master might, *in such a case, ask us for advice or for any help we might be able to give him.*"

(2 R 150:6-151:5.)

"... After the ship arrives, practically everything we do is done in cooperation and in conjunction with the master, or the officers of the ship. We don't do anything on our own behalf."

(2 R 156:22-25.)

"A. In the capacity of the husbanding agent, we work in conjunction with the masters and do things in conjunction and in cooperation with him and with his approval. If he wants a list of stores, so much meat, vegetables, ice and so forth, if it looks too big to us, we go over the list with him."

I think we have enough experience to know whether he is *overordering or not. If he orders more rope than we think he needs, if he has got five cords and we think he only needs two, we cut them down, with his consent. If he insists, we buy them. If the items are too big and unusual, we would cable the owners in Peru, asking for their approval.*"

(2 R 163:5-15.)

“Q. You say they do it automatically? Assuming that Mr. Carter or Mr. Keefer, under your supervision now, when you are back on duty—let’s go back to when you were on duty, and they found that there was something wrong with the ship. Would they make a report to you of any kind? Were they instructed to make a report to you?

A. They would probably come back and report anything of interest to the owner, or to the master. The master would probably know about it anyhow. But if they saw anything that was unusual, they would probably report it.”

(2 R 168:13-22.)

“Q. And if they [the longshoremen] quit and the ship’s master doesn’t do anything about it, what would you do about it?

A. Well, I would naturally consult with the master and find out why he wouldn’t want to correct an evil, if it existed. If it was a breakage, we would have to correct it.

Q. Let’s assume that you talked to the ship’s master and the ship master was stubborn and he was wrong, and he wasn’t going to correct it, what would you do about it?

A. I would cable to the owners in Peru that the ship was such and such and the master refused to do such and such and ask for instructions.”

(2 R 174:16-175:1.)

“A. If there was not sufficient lighting in the hold for the men to work—first of all, the contracting stevedores—let’s get the difference between stevedores and

longshoremen. The stevedore is a contractor; the contracting stevedore's representative would no doubt go to the ship's officers and ask for more lights. If he didn't get them, he would probably make a complaint to my office. *We would then approach the master, find out why; he would either have a reason or wouldn't have a reason.*"

(2 R 178:1-9.)

"From that time on, when the ship is in port, the duties of our representative is to cooperate with the master, giving him whatever assistance he needs in connection with the crew matters, sickness, hospitalization, wages, payment of crew wages . . ."

(2 R 233:25-234:4.)

"If the master has any difficulties in connection with the operations while he is in port, from any source, he naturally looks to us as his friend in port to assist him and help him to get over any snags he may encounter."

(2 R 234:9-12.)

"Q. Assuming the master of this SS RIMAC had a few too many to drink and rented one of our rental automobiles, ran over and killed a pedestrian on the street, and was thrown in jail and wouldn't be able to get released on bail, or if he did get released on bail, the surety company would want to be sure this man would remain here so he would answer to the charges of the Court.

Then it became necessary to find someone to replace this master because of these conditions. What would you do as the ship's husband in that case?

A. Cable the owner that the master is in the jug, 'What are your instructions?' "

(2 R 244:8-19.)

Keefer

"Q. It was your duty and responsibility, was it not, Mr. Keefer, to make sure that the ship was being properly unloaded, so that it would get to its next destination, was it not?

A. No, I wouldn't say that is a proper statement. It was the duty of the agents to co-ordinate, as far as possible, such activities concerning the unloading of the ship so there would be no delay, or with the consent of the master.

Q. In other words, you went on board ship, first of all, to see if the master needed any supplies?

A. Right.

Q. Of if there were any things that you could do to help the master of the ship?

A. Yes."

(2 R 193:10-22.)

"Q. And if there were any repairs that had to be done to the ship, or it needed repairs, the master pointed it out to you and it was up to you to see that you got that help for him, is that right?

A. If the master told us that he wanted to have repairs, we would arrange for local repairmen to come aboard and do the work under his instructions and those of his chief engineer. We would not tell the ship repairer what to do.

Q. I didn't ask you whether it was his instruction or not, but that is what you do?

A. We would arrange for the local services of that kind."

(2 R 194:11-21.)

"Q. And it was up to you and it was your responsibility that things ran smoothly so that ship could go to Pier 26 when it left there as quickly as the ore was unloaded at Selby, is that right?

A. I would not say it is our responsibility to see that it is done. It is our responsibility to do the best we can to co-ordinate things so there is no delay to the ship.

Q. Well, the best thing that you can do to coordinate the ship is to see that everything ran with dispatch and there was no hitches, no tie-ups, no accidents, is that right?

A. That would be it, yes.

Q. And that was part of your job?

A. Yes.

Q. And if there was anything wrong that you saw aboard that ship, it was your long-standing instructions to report that and make a memo on it to Mr. Bailey, is that right?

A. You would normally do that, yes, if there was anything of an unusual nature; naturally you would report it to your superior."

(2 R 195:15-196:8.)

"Q. Referring to one that says 'Winch at No. 1 hatch—old friction type.' Do you find that there?

The Court. Down in the right lower-hand corner.

The Witness. Yes, I see it.

Mr. Garry. Q. Is that in your own handwriting?

A. That is mine, yes.

Q. It says, 'Very difficult to operate. Requires one winch driver only.' Where did you get that information?

A. To the best of my recollection, at this time, it was sent to us by our Los Angeles office, who got it from the ship, on arrival of the ship there.

Q. That information was imparted to you?

A. From Los Angeles.

Q. How would it get into the ship log? Is the ship log something that is personally entered after personal observation on the ship?

A. Not necessarily; anything that is pertinent. This is only useful in connection with that particular operation of the ship, but in the event that the ship should come back another time, you refer back to a previous log for information regarding the ship.

Q. And that type of information you impart to the stevedores that you hire upon that ship, is that right?

A. You would impart it to the stevedores, whether you hired them or anyone else hired them. They would need the information, yes."

(2 R 210:6-211:6.)

Krag

"The Witness. The duties of a husbanding agent would be to contact the vessels before arrival in port for the expected time of arrival. With the information he then notifies the various authorities, customs people, and he makes arrangements for getting the vessels to their loading or discharging berth. *After the*

arrival he contacts the master and places himself at his service for whatever ship's business is to be done by him as an agent for the vessel."

(2 R 262:8-15.)

(Emphasis added.)

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VS.

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a corporation,

Appellee.

Appellee's Brief

Appeal from the Judgment of the District Court
of the Northern District of California.

Honorable OLIVER D. HAMLIN, Judge.

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FILED

JUL 29 1958

PAUL P. O'BRIEN, CLERK

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JURISDICTIONAL STATEMENT

Defendant appellee does not controvert the statement of pleadings and facts with respect to jurisdiction, appearing in appellant's brief under the head "Pleadings". Jurisdiction of the District Court was under 28 USC § 1332(a)(1). Jurisdiction of the court is under 28 USC §§ 1291 and 1294(1).

STATEMENT OF THE CASE

The first five paragraphs of the appellant's "Statement of Facts" are generally accurate, subject to the following corrections or amplifications:

- (1) At all times material to the complaint the *Rimac*, on which the plaintiff worked as a longshoreman, was under the command of Peruvian Naval officers (Finding 2, 1 R 76: 4-5).
- (2) No finding was made as to whether the plaintiff actually fell in any oil on the deck of the *Rimac* or, if he did, whether he was injured thereby (Findings, 1 R 75-77). These matters were seriously disputed at trial (Defendant's Opening Statement, 2 R 10).
- (3) The appellant's brief states (p. 4) that no finding was made on the issue of negligence. But the Court specifically found that Balfour, Guthrie & Co., Limited did not exercise or have any authority or duty to exercise any control over the operation or management of the vessel (Finding 3, 1 R 76: 16-18) or her decks or winches (Finding 4, 1 R 76: 19-21) and did not cause or permit oil to accumulate on her decks (Finding 4, 1 R 76: 22-23) or cause or permit her to become unsafe (Finding 4, 1 R 76: 24-25). These findings covered any possible issue as to negligence of Balfour, Guthrie & Co., Limited.

The Complaint was based upon the claim that Balfour, Guthrie & Co., Limited (hereinafter referred to as Balfour) "managed" the *Rimac*, jointly with others, during the time the plaintiff was on board (Amended Complaint, 1 R 8:24). In the appellant's brief (p. 4) it is contended that Balfour had "joint control" or "joint responsibility" with the Peruvian government. The District Court found specifically that Balfour had no such control, management or responsibility (Findings 3 and 4, 1 R 76). The only issue on this appeal is whether those findings are supported by the evidence.

ARGUMENT

A. The Findings Are Supported by the Evidence.

In the appellant's brief (p. 7, last paragraph) it is said that the "uncontradicted evidence of both sides" shows that Balfour had the "joint management" of the *Rimac*. It is difficult to characterize such assertions as more than frivolous.

In the first place, none of the testimony quoted in the Appendix to the appellant's brief would justify, must less require, a finding that Balfour had the management of the *Rimac*. In that testimony the witnesses spoke of assisting the vessel's master by arranging for stores and supplies (App., pp. i-ii), making Balfour's office available as a headquarters for ship's business (App., p. ii), advising, helping and cooperating with the master and purchasing supplies for him (App., p. iii), reporting on and counselling regarding troubles on shipboard (App., p. iv),* assisting, helping and cooperating with the master when difficulties arose (App., p. v), requests to the shipowner for instructions (App., pp. v-vi), coordination of unloading activities, arranging repair services and reporting troubles (App., pp. vi-vii), recording and advising stevedores of useful information concerning the ship's operating characteristics (App., pp. vii-viii), and arranging for vessel's arrival and contacting the master to learn his needs (App., pp. viii-ix). None of this would justify—must less require—a finding that Balfour had any control or management of the ship or responsibility for her condition.

Moreover, the record is replete with testimony concerning the limited functions assumed by Balfour. For example, the plaintiff put in evidence Balfour's Answers to Interrogatories, including No. 11 (Pl. Ex. 5, 1 R 39-40; 2 R 173: 9-16):

*On page iv of the Appendix, paragraph 4, third line, the word "we" should read "he"; see 2 R 174:20.

"No information is available as to the exact conversation or the exact terms of any oral agreement relating to services rendered to the *S.S. Rimac*. The services were rendered pursuant to an informal request, probably by telephone from Mr. F. L. Doelker, of Grace & Company (Pacific Coast), which was acting for W. R. Grace & Co., Lima and the Republic of Peru. Mr. Doelker spoke to Mr. L. P. Bailey, requesting Balfour to act as port husbanding agent for the *Rimac* on the basis as it had acted on prior occasions for other Peruvian vessels. It was understood that, as husbanding agent only, Balfour would not arrange for stevedoring but would perform only those services customarily performed by port husbanding agents—that is, to arrange for berthing the vessel and to arrange for such further services and supplies for the said vessel as might be requested by her master or by the Republic of Peru, as her owner. Such informal arrangements are common in the industry and the duties of a husbanding agent, as described, are well understood."

To the same effect is the Affidavit of Mr. Bailey (Pl. Ex. 2; 1 R 20-22; 2 R 137: 6-10):

"that Balfour did not at any time manage or have authority to manage the said vessel and did not have any function, activity or relationship with respect to the said vessel or her owners other than as port agent; That as port agent Balfour was assigned the function customarily performed by port agents except that it was not authorized to and did not arrange for stevedore services, or collect freight moneys; that Balfour did not invite the plaintiff or any other stevedore on board the *Rimac* and it neither had the authority to, nor did, consent to the plaintiff's presence there; that the only function customarily performed by a port agent and the only authority or duty given to Balfour was to arrange for berthing the vessel and to arrange for such further services and supplies for the said ves-

sel as might be requested by her master or by the Republic of Peru, as her owner; that Balfour's assistance to the *Rimac* including arranging for a Bar Pilot, arranging for a Bay Pilot and tug assistance, notification to the Marine Exchange. Exchange of ship movements, assistance in getting Customs clearance for the vessel, purchase of provisions, charts and rope, and arranging for similar services and supplies;

That port agents customarily do not have and Balfour did not have any authority or control over the vessel or her master, officers or crew or any authority or duty with respect to maintaining the vessel, her decks, winches or other equipment or keeping the same in safe condition; that Balfour did not perform or arrange for any work in connection with the operation or maintenance of the winches or maintenances of cleaning of the decks in the vicinity of the winches;

That the only employees of Balfour who were aboard or in the vicinity of the *Rimac* from August 27 through August 29, 1954, were C. F. Keefer and W. W. Carter;

That he had no knowledge or notice of the accident alleged in the Complaint prior to service of the Complaint;"

To the same effect was Mr. Bailey's testimony at the trial (2 R 141:13-142:23):

"Q. What is a port agent, Mr. Bailey?

A. Well, a vessel is scheduled to call at a port, San Francisco, and it will be the same formality at all ports. By the time she is due, an agent will make the necessary arrangements so that she can proceed to her loading or discharging berth, to start work as promptly as possible, with no delay.

In doing that, you will arrange, first of all, for entry of the custom house, arrange berth of the ship, arrange for pilots, if any are necessary, and linesmen, if they are necessary, to tie her up. That is putting your ship in the berth ready to work.

You then assist the master, and you then have an opportunity of meeting him, in giving him whatever information or assistance he may require, being a stranger in the port. Further, you arrange for the purchasing of any stores or supplies he may need. If he has sickness, arrange for the hospitalization or doctors.

The Court: If he has sickness?

The Witness: Yes, arrange for hospitalization or doctors. If there is a question of money to be advanced for the crew for some reason or other, payment of wages. You then establish a place for headquarters for the ship, which naturally is our office, where anyone having business with the ship would contact us; filing correspondence pertaining to the ship's operations, or the functioning of the ship, or anything that comes up in connection with the ship's work. That is the headquarters, the agent's office.

Mr. Garry: Anything else, Mr. Bailey?

A. No, that is about all.

Q. How about arranging for stevedoring, longshoring and so forth?

A. Arranging for stevedores would be a situation which would arise in connection with your arrangement with the owner. As a husbanding agent, you do not arrange for stevedoring, generally speaking. You can always arrange for stevedores as a husbanding agent."

The limited nature of Balfour's contacts with the vessel was pointed up by the testimony of Mr. Keefer, one of the two Balfour employees who went on board, that on each of his two visits to the ship he stayed only about an hour. (2 R 199: 6-13). Mr. Bailey's testimony was to the same effect (2 R 234: 13-235: 14):

"Q. How much time do your representatives normally spend aboard a ship while she is in port?

A. It will depend considerably on the length of time in which she is in port. It has been our policy

immediately on arrival, for our representative to be aboard the ship no matter where berthed, the San Francisco side, the Oakland side or Selby or Stockton. Our man proceeds to the ship and he can get through his duties, if there is not too much interference, within about an hour or hour and a half time, and leave the ship. That is the day of arrival.

If she is here for only one day or two days, he would probably go up again the next day just before sailing. If she is here a week, we might make one more trip during the week, and might not. We might do it by telephone, depending upon how busy we might be in the office.

If the Captain has any grievance or has any trouble, he can always phone us, or he generally comes in the office, but we don't tend the ship unless there is some reason for us to help the Captain or do something for him. They may call upon us to do so. So the ship being in port—well, say one of these ships would average three or four days, we might be on the ship not more than three times for an hour each time, or about an hour; not more than two hours.

Q. And if the ship is in port longer than that some days, you don't have anyone aboard at all?

A. There are many days we don't send anyone to the ships, sir."

There is clearly no basis whatever for the appellant's contention that the findings are not supported by evidence.

B. Since Balfour Did Not Have Control or Management of the RIMAC, Appellant's Authorities Are Not in Point.

Since the findings that Balfour had no control or management of the *Rimac* are fully supported, the appellant's authorities are clearly inapplicable and we will refer to them only briefly.

In the absence of a finding that Balfour had any control of the vessel, there is no possible basis for finding any duty to the plaintiff. Consequently the references in appellant's brief to the Restatement of Torts and other texts dealing with joint or concurrent tortfeasors are not in point. Decisions on liability of joint or concurrent tortfeasors are similarly out of place (*The Atlas*, 93 U.S. 302; *The Modemi*, 52 F.2d 756).

Since there is no issue before the court as to whether Balfour would be entitled to immunity as a result of its relationship with its principal, the Republic of Peru, we can see no possible relevance in *Hopkins v. Clemson College*, 221 U.S. 636, 31 S.Ct. 654 and *Contino v. B. & A. RR Co.*, 178 Fed. 2d 521.

In the *Contino* case it was found that the defendant railroad had engaged in a joint enterprise with a state agency to build and maintain an unsafe underpass and the railroad was held liable for its own negligence in that enterprise. But there is no issue on this appeal as to whether Balfour might be held liable for its own negligence. The findings that Balfour had no control, management or responsibility negate any basis for contending that Balfour was engaged in a "joint enterprise" with respect to the vessel. Surely no employee or agent is, as such, engaged in a "joint enterprise" with his principal so as to be liable for the principal's torts!

Similarly, decisions that a vessel's agent can be held liable for its own negligence are not in point: *U.S.B.E.F. v. Greenwald*, 16 F.2d 948; *Brady v. Roosevelt SS Co.*, 317 US 575, 63 S. Ct. 425; *Quinn v. Southgate Nelson Co.*, 121 F. 2d 190. There was never any contention that Balfour was negligent, aside from its alleged responsibility for the safe condition of the vessel. Nor can the appellant place any

reliance on cases involving conspiracy and concerted action, or aiding, abetting or participating in *intentional* torts or other breaches of duty: *Thompson v. Johnson*, 180 F.2d 431; *Meints v. Huntington*, 276 Fed. 245; *Montgomery Ward & Co. v. N.P. Term Co.*, 128 F.S. 475.

C. The Authorities Are in Accord that a Shoreside Husbanding Agent or Port Agent Is Not Responsible for the Vessel's Condition and Is Not Liable to Third Parties.

Assuming that a government agent is liable for his own torts, it has never been held that a mere husbanding agent could be held liable to third parties for defects in the ship's condition.

At one time, particularly in England, the term "ship's husband" was used to refer to a "managing owner" of a vessel, who acted as general agent for all of the other owners in managing all of the ship's affairs, including management of the vessel herself, as well as shoreside affairs. But the term "ship's husband" has not been used in that sense in recent years, at least in this country. It is applied now to an agent employed to assist the master and owner of the vessel with respect to the shoreside contacts which a ship must make while in port. See the testimony of Mr. Bailey, 2 R 141-142.

With respect to a *general* agent, which undertakes to act for the owner in connection with operation and management of the vessel, there have been substantial questions as to the general agent's liability to third parties with respect to the safe condition of the vessel. But even in that situation the Supreme Court held that the general agent did not have such possession and control of the vessel as to make it liable to a longshoreman injured on board. *Caldarola v. Eckert* (1947), 332 U.S. 155, 67 S. Ct. 1569. The court held the general agent not liable even though the agent, under the

standard form of General Agency Agreement with the United States, had expressly agreed to "equip, victual, supply and maintain" the vessel. Consistent with this, the Supreme Court held that such a general agent was also not liable to a seaman. *Cosmopolitan Shipping Company, Inc. v. Robert A. McAllister* (1949), 337 U.S. 783, 69 S. Ct. 1317:

"The Caldarola Case, 332 US 155, 91 L ed 1968, 67 S Ct 1569, undermined the foundations of *Hust*. See the dissent therein at pp. 161-163. Caldarola held that the general agents under the standard form contract were not in possession and control of the vessel so as to make them liable under New York law to an invitee for injuries arising from negligence in its maintenance, pp. 158, 159. Our ruling was based on 'the interpretation of that contract' as 'a matter of federal concern.' We do not think it consistent to hold that the general agent has enough 'possession and control' to be an employer under the Jones Act but not enough to be responsible for maintenance under New York law. It is true, as respondent argues, that Caldarola dealt only with the general agent's liability to a stevedore, as opposed to a crew member, under the law of New York. We think, however, that vicarious liability to anyone must be predicated on the relation which exists under the standard form agreement and the shipping articles between the general agent on the one hand and the master and crew of the vessel on the other. Caldarola held that this relation was not one which involved that proximity necessary to a finding of liability in the general agent for the torts of the master and crew. We perceive no reason why the rationale of this holding does not apply with equal force to a suit under the Jones Act. Under common-law principles of agency such a conclusion is required. * * *. (p. 793)"

If a *general* agent is not responsible to the third parties for the vessel's condition, *a fortiori* a mere port agent is

not. Indeed we are aware of only one other decision in which such a claim apparently was advanced—and then the court, in dismissing the complaint, found it necessary to say little more than this:

“it is manifest that defendant Garcia was no more to the vessel than a husbanding agent acting in every respect for its principal * * *.”

Romero v. International Terminal (1956, SDNY),
142 Fed. Supp. 570, *Aff'd.* on opinion below on this
point—(1957, C.A. 2) 244 Fed. 2d 409*

A vessel coming into a foreign port must make many arrangements with shoreside concerns for supplies and services needed in port. These arrangements cannot conveniently or economically be made without the assistance of a husbanding agent who knows the port and its facilities. There is no basis for the plaintiff's contention that a port agent, in agreeing to give such assistance, renders itself liable to any and every person who may be injured due to unsafe conditions aboard the vessel.

*Certiorari was granted by the Supreme Court, October 14, 1957, Docket No. 322, and the case has been restored to the calendar for reargument in October, 1958. However, it appears that the present question is not involved in the review by the Supreme Court. See 26 U. S. Law Week 3107.

CONCLUSION

The findings of the District Court are fully supported by the evidence and the judgment is in accord with all of the authorities. There is no ground for the appeal; the judgment should be affirmed.

Respectfully submitted,

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APPELLANT'S REPLY BRIEF.

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FILED

AUG 19 1958

PAUL P. O'BRIEN, CLERK

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APPELLANT'S REPLY BRIEF.

Preliminary Notes.

1. The passages in parenthesis in the last paragraph of page 7 of Appellant's Opening Brief should be deleted. We apologize to the Court that this intra-office "humor" found its way from comments on the rough draft clear into the printed brief.

2. Appellee is right in the correction made by the footnote on page 3 of Appellee's Brief.

On the merits, Appellee's Brief makes three arguments: (1) It cites the affidavits as evidence allegedly

supporting the findings. In this connection it seeks to uphold the judgment on the strength of alleged "customary" duties of a ship's husband; (2) it argues (p. 8) that "In the absence of a finding that Balfour had any control of the vessel, there is no possible basis for finding any duty toward the plaintiff; (3) it cites two United States Supreme Court decisions which are clearly not in point. Discussion of the first argument will largely answer the two others.

I.

APPELLANT'S POINTS NOT ANSWERED IN APPELLEE'S BRIEF.

Appellee does not question the rule of solidary liability in case of joint control. (Appellant's Op. Br. pp. 10-15.) It argues that the rule does not apply to the facts (Appellee's Br. pp. 8-9), but it does not question the principle of law.

Appellee seems to contest the legal principle only when it argues about "the limited functions assumed by Balfour." (Appellee's Br. pp. 3, 6.) This is answered by the rule of the Restatement, that the solidary liability exists even where the responsibility of the joint managers is unequal. (Appellant's Op. Br. pp. 10-11.)

II.

**TESTIMONY QUOTED BY APPELLEE DOES NOT SUPPORT
FINDING OF "NO AUTHORITY OR CONTROL".**

On pages 4-7 of its brief, appellee quotes from affidavits, and also quotes Bailey's testimony, of which the essential appears on Appx. pp. i and ii of Appellant's Opening Brief, and part of Keefer's testimony.

The implication seems to be that this testimony supports the findings, regardless of the testimony quoted in the Appendix to Appellant's Brief.

But the present case is not one of conflicting evidence. All the testimony (whether by affidavits or in court) comes from the same witnesses. All these witnesses except Krag, were officers or former officers of the defendant—whether called by defendant or by plaintiff. Krag was called by defendant.

Upon this background, the quotations in Appellee's Brief—particularly the affidavits—do not sustain the findings, for three reasons.

First: The affidavits, at least, have no greater strength before the Appellate Court than before the trial Court; and the affidavits contain mere generalities, while the detailed facts are given by the passages quoted in the Appendix to Appellant's Opening Brief.

Second: The same rule applies generally where the problem is not the resolution of a conflict, but the conclusions to be drawn from uncontradicted evidence. Here the specific facts must take precedence over the generalities and conclusions on which the appellee relies.

Third: The “evidence” on which appellee relies consists merely of conclusions, which as a matter of law are valid only so far as there is factual testimony to support them. But the factual testimony is contrary.

We consider these three points in order.

A. Documentary Evidence Is Reviewed by Appellate Courts.

The rule is well settled that there are no presumptions in favor of the trial judge’s findings where the case has been tried on documentary evidence (including affidavits and depositions). The same must be true to the extent that the appellee relies on affidavit evidence to sustain the findings. The rule that an Appellate Court will re-examine written evidence was stated by the Ninth Circuit in *The Natal*, 14 F. (2d) 382, 384:

“ . . . The rule that findings of fact are entitled to great weight in an appellate court is modified where, as here, they are based wholly on depositions. . . . ”

Also:

The Santa Rita, 176 F. 890, 893.

Cases to the same effect from other circuits:

U. S. Corp. Latter Day Saints, 101 F. (2d) 156, 160 (CCA 10);

The Mardosak, 94 F. (2d) 339, 341 (CCA 4) citing *The Santa Rita*, 176 F. 890, *supra*;

Kaesser & Blair, Inc. v. Merchants’ Assn., 64 F. (2d) 575, 576 (CCA 6);

Nashua Mfg. Co. v. Berenzweig, 39 F. (2d) 896, 897 (CCA 7).

B. Appellate Court Reviews Conclusions From Undisputed Evidence.

The First Circuit has applied the above rule to undisputed evidence of all kinds; and *The Natal*, 14 F. (2d) 382, supra, indicates that the same is true in the Ninth Circuit.

In *Munro v. Smith*, 259 F. 1, the First Circuit said, in reversing findings:

(pp. 2-3) "The case must turn upon the admitted facts, the inferences therefrom, and upon the interpretation of written evidence, in considering which, of course, the District Court had no substantial advantage over this court. The usual rule of giving great weight to the conclusions of the trial judge who observed the appearance and the manner of the witnesses, is not, therefore, to any substantial degree, applicable in this case. As we are not able to adopt the views of the District Judge, it is necessary to deal in considerable detail with the evidence and the necessary inference therefrom."

The Natal, 14 F. (2d) 382, 384, says, directly after the language quoted above,

"But we do not regard the finding of fact here as depending upon conflicting evidence or the credibility of witnesses. It rather depends upon admitted facts and the conclusions referable therefrom."

In *The Natal*, there was an affirmance but only after a reexamination of the evidence.

It is the general rule that an Appellate Court will reexamine findings which involve merely conclusions

from undisputed evidence. Compare the summary of the law given in 3 Am. Jur. 471 (Appeal & Error, sec. 902):

“However, a finding which rests on conclusions to be drawn from undisputed evidence rather than on any conflict in the testimony, does not carry with it the same conclusiveness as a finding resting only on probative disputed facts. It is rather in the nature of a legal conclusion drawn from undisputed evidence, which, if not in accordance with the view of appellate court, can be disregarded almost as readily as a pure error of law on the part of the trial court. If the undisputed evidence admits of only one conclusion, an opposite finding will not be permitted to stand by the reviewing court.”

C. Evidence on Which Appellee Relies Consists of Conclusions No Better Than Facts Which Underlie Them.

1. Appellee relies on general statements that it had no “control” or “authority” over the SS RIMAC or her operations while she was in port on the waters of San Francisco Bay.

The first quotation (answers to Interrogatories, Appellee’s Br. p. 4) is ambiguous on this point. After referring generally to “services customarily performed by port husbanding agents”, it says, “to arrange for berthing the vessel and to arrange for *such further services and supplies as might be requested* by her master or by the Republic of Peru, her owner.” (Italics added.)

This identical language is repeated in the affidavit of Bailey (Appellee’s Brief, foot of page 4 and top of page 5). Added to that are the broad assertions:

(p. 4) “. . . that Balfour did not at any time manage or have authority to manage the said vessel and did not have any function, activity or relationship with respect to the said vessel or her owners other than as a port agent. . . .”

(p. 5) “That port agents customarily do not have and Balfour did not have any authority or control over the vessel or her master, officers or crew or any authority or duty with respect to maintaining the vessel, her decks, winches or other equipment or keeping the same in safe condition. . . .”

But allegations of “control”, “authority” or lack of them are merely conclusions from specific facts. Standing alone they do not sustain a finding; at best they are as good or as bad as the specific facts on which they are based. Compare the following cases:

Ritchie v. McMullen, 159 U.S. 235, 241:

(p. 241) “The general averments . . . in the second part, that ‘said judgment was . . .’ ‘without any . . . authority on the part of the court to enter such judgment . . .’ are but averments of legal conclusions. . . .”

Goltra v. Davis, 29 F. (2d) 257 (CCA 8):

(p. 260) “The allegations in the amended and supplemental bill that John W. Weeks, as Secretary of War, had no power or authority under the terms of the contract to terminate the same . . . are mere conclusions of law.”

Pac. Employers Ins. Co. v. Hartford Acc. & Ind. Co., 228 F. (2d) 365 (CA 9):

(p. 369) "These definitions lead us to accept the *conclusion* reached by the trial court, that *Neil had such control* of the premises that the exclusion in Pacific's policy did not come into effect" (Italics added.)

Other cases holding that "control" or "authority" result from specific facts:

U. S. v. Marshall Transport Co., 322 U.S. 31, 32-3:

"Refiners, as the Commission found, is *controlled through ownership* of 82.6% of its outstanding common stock by Union T and Car Company, a non-carrier corporation." (Italics added.)

Universal Carloading & D Co. v. RR Ret. Bd.,
71 F.S. 369, 371.

Under these authorities, vague assertions that Balfour-Guthrie "had no control" or "had no authority" can have no weight against evidence of specific facts set forth in the Appendix to Appellant's Opening Brief.

The only other evidence which appellee cites is that of Keefer as to how often Balfour employees boarded the ship in port (Appellee's Brief, pp. 6-7). But that does not contradict the other testimony. It merely shows how often they thought it necessary to be on the boat in order to fulfill their responsibilities, as described in their other testimony. Perhaps they did not visit the boat often enough, and that is what has given rise to this case.

2. a. The testimony that appellee assumed the same duties as are "customarily" assumed by port agents means nothing until those "customary" duties are

defined. As already shown, the definition of these duties produced the testimony noted in the Appendix to Appellant's Opening Brief, together with the statement that Balfour, Guthrie handled all the Peruvian ore ships the same way. (App. Op. Br. p. 9). It is from these detailed facts that the conclusion follows that Balfour, Guthrie exercised enough authority and control while the ship was in port on San Francisco Bay to make Balfour, Guthrie jointly responsible for the safety of the longshoremen while on the vessel.

b. The detailed testimony in this case distinguishes *Romero v. International Terminal*, 142 F.S. 570, 244 F. (2d) 409, Appellee's Br. p. 11. At page 573 of the opinion the court says,

“There was no proof adduced at the pretrial hearing of management, operation and control by Garcia except as it might arise by virtue of the agency agreement.”

D. Finding of Control Does Not Underlie Other Findings—But Vice Versa.

Appellee puts the cart before the horse when it says at page 8 of its brief, “In the absence of a finding that Balfour had any control of the vessel, there is no possible basis for finding any duty to the plaintiff.” As already shown, the situation is the other way around. Control or absence thereof *follows from other facts*. In this case the undisputed specific facts show joint control by the appellee and the Peruvian Government.

So also on page 8, appellee clouds the issue by a literally correct but misleading statement:

“Surely no employee or agent is, *as such* engaged in a ‘joint enterprise’ with his principal so as to be liable for the principal’s torts.” (Italics added.)

“As such” an agent may not be engaged in a joint enterprise with his principal; but the evidence may show that he is, at least as far as third persons are concerned. And it begs the question to say “to be liable for the principal’s torts.” If agent and principal are working in consultation, failure in a non-contractual duty toward a third party, is not only the principal’s tort, but also the agent’s own tort. (*Restatement of Torts*, sec. 878. App. Op. Br. p. 10 and cases cited in Opening Brief, pp. 14-15.)

E. Cases on General Agents Not in Point.

At pages 9 and 10 of its brief, appellee cites two Supreme Court cases on general agents under standard contracts with the United States Government (*Caldarola v. Eckert*, 332 U.S. 155; *Cosmopolitan Shipping Company, Inc. v. Robert A. McAllister*, 337 U.S. 783). Neither of these concerned a port agent nor the specific management of a ship in port. Appellee makes a complete *non sequitur* when it argues (pp. 10-11): “If a *general* agent is not responsible to third parties for the vessel’s condition *a fortiori*, a mere port agent is not” (Appellee’s italics).

Whatever may or may not be the responsibilities of a general agent, they would not be inconsistent with holding a port agent responsible for the conditions on a vessel *while in port*, especially when the evidence

shows the port agent has assumed joint responsibility for such conditions.

Secondly, since the evidence in the present case has shown appellee's whole course of conduct with regard to the Peruvian naval vessels, conclusions drawn *under a different written contract* between the United States Government and the operators in the *Caldarola* and *McAllister* cases would not be applicable here.

Finally, neither of these two cases concerned conditions peculiar to the vessel's work while in port. The accident in *Caldarola v. Eckert*, 332 U.S. 155, occurred in port, but arose from a defective boom; i.e., part of the permanent structure of the ship. The Court held this was the sole responsibility of the owner, not of the general agent. (Contrast these facts with those of *Brady v. Roosevelt SS Co.*, 317 U.S. 545—defective rope ladder for boarding vessel from small harbor boats).

In *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, a seaman caught poliomyelitis while the ship was in Chinese coastal waters or in Chinese ports. Negligence was charged in alleged failure to furnish proper treatment. It was held that under the standard contracts of the United States Government, this was the responsibility of the owner (the United States) not of the general agent. The case obviously is not parallel to the present one.

Both of the two cases cited arose under a different contract, and wholly different factual situations.

III.

CONCLUSION.

Detailed evidence spells out the relation between Balfour, Guthrie and the Republic of Peru. This evidence is uncontradicted. All of it comes either from witnesses called by the defense or by defendant's officers or retired officers called by the plaintiff. The sole question on appeal is what conclusions to draw from this uncontradicted evidence.

The detailed facts show joint management of the ship in port by appellee and the shipowners (Republic of Peru). Against this detailed testimony no weight can be given to general assertions that Balfour had "no authority" or "no control". Since the undisputed facts show joint management of the RIMAC while on the waters of San Francisco Bay, the appellee may be held solely liable for the consequences of negligence in that management. The contentions of our opening brief stand, and the judgment should be reversed as there indicated.

Dated, San Francisco, California,

August 11, 1958.

Respectfully submitted,

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GEORGE OLSHAUSEN,

Attorneys for Appellant.

No. 15908✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ISADORE SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

JUL 29 1958

PAUL P. O'BRIEN, CLERK

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No. 15908

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ISADORE SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court is founded upon Section 3231, Title 18, United States Code. The petition to vacate the original judgment was made by appellant under Section 2255, Title 28, United States Code. The jurisdiction of the Court of Appeals to entertain this matter may be found under the provisions of Section 1291, Title 28, United States Code, and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

II.

STATEMENT OF THE CASE.

On July 12, 1956, Appellant was found guilty in the United States District Court, Southern District of California, Southern Division on all counts of an indictment charging violations of Title 18, United States Code, Section 545, and Title 26, United States Code, Section 4755. On July 26, 1956, the Honorable James M. Carter, District Judge before whom the case was tried, sentenced Appellant to a term of five years on Count One of the Indictment and imposed a fine of \$5,000.00. On Count Two of the Indictment Appellant was sentenced to a term of five years to run consecutively to the sentence on Count One and fined \$1.00. On Count Three of the Indictment Appellant was sentenced to a term of five years and fined \$1.00, said five year term to run concurrently with the sentence imposed on Count Two. On September 4, 1956, pursuant to a motion by Appellant the judgment was modified in that the execution of sentence on Count Three only was suspended and the defendant placed on probation for a period of five years to commence upon completion of the sentences imposed on Counts One and Two. A Notice of Appeal was filed; however, this appeal was dismissed by this Honorable Court on April 23, 1957 for non filing of the record.

On October 7, 1957, Appellant filed a Motion to Set Aside and Vacate the Sentence Under Title 28, United States Code, Section 2255 on the ground that he was insane at the time of arraignment, trial and sentence [Clk. Tr. p. 99].

On October 25, 1957, a memorandum was filed and endorsed by the District Court denying the Motion to Vacate

[Clk. Tr. p. 111]. A Notice of Appeal from this decision was filed by Appellant on November 26, 1957 [Clk. Tr. p. 115] and an Application for Leave to Proceed in *Forma Pauperis* [Clk. Tr. p. 116]. On December 6, 1957, the District Court filed and endorsed an Order and Certificate of Lack of Good Faith [Clk. Tr. p. 118]. A Motion to Review the Order of the District Court was received by Appellee on December 22, 1957. On January 20, 1958, an Order of this Honorable Court Granting Appellant's Prayer to Proceed in *Forma Pauperis* was filed and endorsed. Said order directed that counsel be appointed to represent Appellant. However, Mr. Smith elected to proceed in *propria persona*. On April 1, 1958, Appellee received a motion filed in this Honorable Court "To Dismiss Conviction and Sentence" and on April 9, 1958, Appellee received a brief filed by Mr. Smith in his own behalf urging that the District Court erred in concluding that he was sane at the time of trial. Thereafter a number of motions were filed by Mr. Smith which are not pertinent to the issue now pending.

III.

SPECIFICATION OF ERROR.

Appellant sets forth a number of "questions presented" in his brief (Appellant's Br. p. 2). The instant appeal, however, presents only one simple issue to this Honorable Court:

DID THE DISTRICT COURT ERR IN DENYING WITHOUT A HEARING APPELLANT'S MOTION TO VACATE HIS SENTENCE ON THE GROUND THAT HE WAS INSANE AT THE TIME OF TRIAL?

IV.

ARGUMENT.

A. Mental Impairment Must Be of an Extreme Degree Before It Renders a Person Unamenable to Trial.

The Government concedes that a motion under Title 28, U. S. C., Section 2255 is an appropriate method for a prisoner to challenge his confinement on the ground that he was insane at the time of trial.

Joseph Orby Smith v. United States, F. 2d.....
(9th Cir., 1958, decided July 7, 1958);

Bishop v. United States, 350 U. S. 961 (1956),
vacating 223 F. 2d 582.

Furthermore, in order to justify denying such a motion without a hearing "the files and records of the case [must] conclusively show that the prisoner is entitled to no relief, * * *."

28 U. S. C., Sec. 2255;

Garcia v. United States, 197 F. 2d 687.

For a proper consideration of the issue now pending before this Honorable Court, it is important to have clearly in mind the standard involved. We are not here concerned with appellant's "responsibility" that is, his ability at the time of the commission of the offense to distinguish right from wrong and adhere to the right. The present appeal involves only Mr. Smith's mental state at the time he was arraigned, tried, and sentenced. The test, therefore, in this inquiry is whether appellant understood the

nature of the proceedings against him and was able properly to assist in his own defense.

18 U. S. C., Sec. 4244;

Gunther v. United States, 215 F. 2d 493, 496 (C. A. D. C., 1954);

Higgins v. McGrath, 98 Fed. Supp. 670, 673 (U. S. D. C. W. D. Mo. 1951) subsequently considered by the 9th Circuit on a related matter in *Higgins v. Binns*, 205 F. 2d 650 (9th Cir., 1953);

United States v. Smith, 131 Fed. Supp. 88, 94-95 (U. S. D. C. Vt., 1955);

United States v. Gundelfinger, 93 Fed. Supp. 630, 631 (U. S. D. C. W. D. Pa., 1951).

Stated in the converse, before a man is considered unamenable to trial, it must appear that his mental faculties are so far impaired that he is either unable to comprehend the nature of the proceedings against him, or is unable properly to aid in his own defense. It is obvious that the degree of mental impairment must be extreme before such a result follows. In the light of this standard it is patently clear that the ruling of the Honorable James M. Carter on appellant's motion under Section 2255 was entirely correct.

B. Only Part of the Matters Now Urged by Appellant Before This Honorable Court Were Presented to the District Court.

An examination of Judge Carter's memorandum in which appellant's motion was denied [Clk. Tr. p. 111] reflects that the denial does not specifically set forth that the action was taken on the basis of the entire "files and records." However, a reading of the memorandum dem-

onstrates that the "files and records" were, in fact, the basis for Judge Carter's ruling, and the memorandum is tantamount to an explicit recital that the action taken therein was based on the "files and records."

Adams v. United States, 222 F. 2d 45 (C. A. D. C. 1955);

See:

Garcia v. United States, *supra*.

It is well established that the Court of Appeals will not address itself to matters which have not been presented to the District Court in determining whether or not the action taken in that forum was correct.

Seals v. Johnson, 95 F. 2d 501 (9th Cir., 1938);

Garrison v. Johnson, 104 F. 2d 128, 129-130 (9th Cir., 1939), cert. denied 308 U. S. 553; rehearing denied 308 U. S. 636;

Davis v. Johnson, 144 F. 2d 859 (9th Cir., 1944).

At the time appellant first made his motion in the District Court he urged, as one basis for his motion, his past history with the Veterans Administration namely, that he had been discharged from the Naval Service in 1945 on the ground that he was 50% disabled because of a mental condition; had been under the care of a Veterans Administration psychiatrist; at one time was found 100% disabled, and at the time of trial was considered 80% mentally disabled by the Veterans Administration [Clk. Tr. p. 102]. It further appears that the District Court was necessarily apprised of the fact appellant was confined in the Federal Hospital at Springfield, Missouri [Clk. Tr. p. 102]. In his motion before the District Court, Smith also alleged that a timely motion for a psychiatric examination had been made by his counsel

[Clk. Tr. p. 105]. However, this assertion is not supported by the record, and the only occasion on which counsel for Smith mentioned the latter's medical history was at the time of sentence [Rep. Tr. pp. 584-586]. At that time Mr. Curzon, appellant's counsel, advised the Court that appellant was sane [Rep. Tr. p. 586].

In the points urged before this Honorable Court, appellant has enlarged upon the matters explicitly mentioned by his motion in the trial forum. He points out that affidavits in support of the issuance of subpoenas on behalf of an indigent defendant indicate that a doctor from the Veterans Administration was desired as a witness by the defendant [Clk. Tr. pp. 15, 16]. Furthermore, appellant points out that the record contains an affidavit by his wife submitted pursuant to a motion for reduction of sentence in which it was alleged by the wife that she did not think appellant had a "real capacity to understand the criminal nature of his acts." [Clk. Tr. pp. 90-91]. Although these particular items were not specifically brought to the attention of the Court by appellant's motion, the Government concedes that they may be considered by this Honorable Court in determining whether Judge Carter's ruling was correct, since the matters are obviously part of the files and records of this cause.

With respect to the other points urged before this Honorable Court by appellant as a basis for reversing Judge Carter's ruling, it is respectfully submitted that since the matters were not presented in the trial forum, they must be disregarded in determining whether or not Judge Carter's ruling was correct.

Seals v. Johnson, supra;

Garrison v. Johnson, supra;

Davis v. Johnson, supra.

The Government is now referring to appellant's allegation that he was found insane by the Veterans Administration (p. 1, Memorandum of Points and Authorities in Support of Motion to Review District Court's Certificate), and appellant's allegations with respect to his disposition and evaluation upon being received at the Federal Penitentiary, McNeil Island, Washington (p. 2 of Memorandum, *supra*; p. 3, Motion to Dismiss Conviction; and p. 17, Appellant's Br.); likewise the affidavit of appellant's wife attached to his brief as Exhibit B must be disregarded.

C. The District Court Properly Concluded That Appellant's Showing Was Insufficient to Require a Hearing Under 28 U. S. C., Section 2255.

It is submitted that matters which may properly be considered in support of appellant's petition are completely outweighed by an examination of his testimony at the time of trial [Rep. Tr. pp. 326-346, 383-428, 511-513] and the proceedings at the time of sentence [Rep. Tr. pp. 580-589]. Appellant's examination under oath indicates beyond a doubt that he was oriented as to time and place, that he thoroughly understood the questions put to him and was able to give clear and intelligent answers. It is significant that Mr. Smith was able to "cooperate" in his own defense to the extent of fabricating a story which was consistent with much of the Government's case in chief and yet exculpated him. It was not until after Smith's story had been rejected by the jury and he had been found guilty that he chose to admit his participation [Rep. Tr. p. 585]. An examination of all his testimony, coupled with the fact that the trial judge had ample opportunity to observe the conduct

and demeanor of Smith throughout the trial, compels the conclusion that a hearing need not have been had on the motion brought under 28 U. S. C., Sec. 2255.

See:

United States v. Gundelfinger, supra.

At the very most the points urged in support of appellant's motion indicate that he may have been mentally unstable. However, this falls far short of even an indication that he was so mentally hampered as to be unable to understand the nature of the proceedings and cooperate in his own defense.

Lebron v. United States, 229 F. 2d 17 (C. A. D. C., 1955);

Higgins v. McGrath, supra.

See:

United States v. Cope, 144 Fed. Supp. 799 (U. S. D. C. W. D. Mo., 1956).

With respect to the allegation concerning Smith's history with the Veterans Administration, it is significant that at no time is it alleged that he was confined in an institution. This history indicates no more than that Smith might be emotionally unstable which, as noted above, does not approach that degree of impairment which renders one unable to stand trial. The argument which is advanced to the effect that this determination by the Veterans Administration created a presumption of "continued insanity" is wholly without merit since it is patently clear that the Veterans Administration was not addressing itself to the problem of whether or not Smith was competent to stand trial. Furthermore, that agency's action can in no way be considered a judicial determination.

(Compare: *Gunther v. United States, supra.*) So too, the fact that Smith is presently in a Federal Hospital at Springfield, Missouri is entitled to little weight since the reasons for transferring a prisoner to such a facility involve factors wholly different from those weighed in determining whether or not he was mentally competent to stand trial. With respect to the affidavit of Smith's wife in support of the motion for a reduction of sentence [Clk. Tr. pp. 90-91] little or no weight can be attributed to this document. (See *United States v. Cope, supra.*) The affidavits submitted in connection with a request for issuance of subpoenas in no way support appellant's contention since the witness from the Veterans Administration was sought to establish Smith's *physical* incapacity to participate in the offense not his mental incapacity [Clk. Tr. p. 12]. Finally, the statement of appellant's counsel at the time of sentence actually supports the position now urged by the Government since counsel who had an opportunity to observe Smith closely categorically stated Smith was sane [Rep. Tr. p. 586]. At the most counsel's remarks suggest that Smith was mentally or emotionally unstable—a condition which, as noted before, falls far short of rendering a person unable to stand trial. (See *Lebron v. United States, supra.*)

In summary the Government respectfully submits that Judge Carter who had ample opportunity to observe appellant during the trial, and particularly during his examination under oath, was entirely justified in concluding that Smith understood the nature of the proceedings against him and was able properly to assist in his defense. For this reason Judge Carter quite properly ruled that the allegations in appellant's motion did not require a full scale hearing under Section 2255 of Title 28, United States Code.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the District Court's ruling denying appellant's motion without a hearing was entirely correct on the basis of the files and records in this cause.

Wherefore, appellee respectfully prays that the appeal be denied.

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No. 15915 ✓

United States
Court of Appeals
for the Ninth Circuit

ROSEHEDGE CORPORATION, Appellant,

vs.

MILLIE STERETT, Appellee.

Transcript of Record

Appeal from the United States District Court
For The District of Nevada

FILED

MAY 20 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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* Page numbers appearing at bottom of page of Original Transcript of Record.

United States District Court For The
District of Nevada

In Bankruptcy No. 921

IN THE MATTER OF THE PROPERTIES
MOULIN ROUGE, INC., A Corporation and
Successor in Interest to MOULIN ROUGE, a
Limited Partnership, Bankrupt.

In Bankruptcy No. 925

IN THE MATTER OF MOULIN ROUGE, A
LIMITED PARTNERSHIP,
Bankrupt.

ORDER FOR SALE OF PROPERTY AND
ORDER AUTHORIZING SALE OF PROP-
ERTY FREE AND CLEAR OF LIENS

At Las Vegas, in said District, on the 6th day of
July, 1956.

The Petition of Harry E. Miller, Trustee of the
Estate of the above named Bankrupts, filed on the
5th day of June, 1956, praying that said Trustee
be authorized to sell, in accordance with the terms
of the Bankruptcy Act, the property belonging to
said estate, having come on for hearing before me
on June 18, 1956, of which hearing notice was
given by mailing copies of the Notice of Hearing
filed herein on June 5, 1956 to all creditors, attor-
neys, parties in interest, and others on June 7,
1956 and the petitions of Harry E. Miller, trustee

of the above named bankrupts, filed on the 21st day of May, 1956 and the 5th day of June, 1956, praying that said trustee be authorized to sell free and clear of liens the property belonging to said estate, having also come on for hearing before me on June 18, 1956, of which hearing notice was given in accordance with the terms of the Order to Show Cause filed herein [2] on June 5, 1956 by mailing to each, every one and all of the lienholders of record, and as listed in the Petition filed on May 21, 1956, a copy of said Order to Show Cause on June 7, 1956, and at which hearing appeared Thomas A. Foley, attorney for the Bankrupts; Cyrus Levinthal, of Fink, Levinthal, and Lavery, attorneys for Jack Silverman; Samuel W. Blum and William G. Ruymann, attorneys for Leroy Investment Co., Inc. and Rosehedge Corporation; William E. Gelder, attorney for Stone Construction Co.; Ralph L. Denton, attorney for a lienholder; Breeze and Breeze, attorneys for a lienholder; Morton Galane, attorney for the creditors' committee; and other creditors and lienholders and their attorneys;

Now, upon the petitions of Harry E. Miller, Trustee herein, duly verified on May 21, 1956, and on June 5, 1956, upon all proceedings had before me at said hearing, at which time all parties were given an opportunity to be heard, and upon the Stipulation entered into on June 19, 1956 between Charles J. Katz, Samuel W. Blum, and William G. Ruymann, attorneys for Leroy Investment Co., Inc. and Rosehedge Corporation, and Quittner,

Stutman and Treister and Morse, Graves and Compton, attorneys for Harry E. Miller, the trustee, and it appearing that there is reasonable prospect that a surplus will be left for this estate upon the sale of the premises of the Moulin Rouge, described in said petitions, after the payment of the liens listed in the petition filed on May 21, 1956 and that the sale of said premises free and clear of said liens thereon is in the best interests of all of the creditors of this estate and will protect the interests of the said lienholders, it is hereby

Ordered, Adjudged and Decreed:

(1) That all objections made during the said hearing to the granting of said petitions be, and the same hereby are overruled.

(2) That the Stipulation entered into on June 19, 1956 between the attorneys for Leroy Investment Co., Inc. and Rosehedge [3] Corporation and the attorneys for Harry E. Miller, trustee herein, be, and the same hereby is approved and said stipulation is made a part of this order, as though specifically set forth herein in verbatim.

(3) That Harry E. Miller, trustee herein, be, and he hereby is, authorized to sell, in accordance with the terms of the Bankruptcy Act, all that certain property belonging to the estate of said Bankrupts mentioned in said petitions and described as follows:

That portion of the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section 28,

Township 20 South, Range 61 East, M.D.B. & M., described as follows:

Commencing at the Southeast corner of the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section 28; thence North $2^{\circ} 50' 40''$ East a distance of 50.09 feet to a point; thence South $89^{\circ} 18' 00''$ West along the North line of Bonanza Road a distance of 363.86 feet to the true point of beginning; thence continuing South $89^{\circ} 18' 00''$ West a distance of 533.00 feet to the Southeast corner of that certain parcel of land conveyed by Edna Shulman to Alfred R. Child et ux by Deed recorded January 19, 1955, as Document No. 32228, Clark County, Nevada records; thence North $1^{\circ} 24' 00''$ East a distance of 153.49 feet to a point; thence North $43^{\circ} 36' 30''$ West a distance of 48.03 feet to a point; thence North $1^{\circ} 24' 00''$ East a distance of 146.30 feet to the Northeast corner of said conveyed parcel; thence North $89^{\circ} 18' 00''$ East a distance of 926.99 feet to a point; thence South $1^{\circ} 24' 00''$ West a distance of 194.78 feet more or less to a Southeast corner of that certain parcel of land conveyed by J. A. Haggard et ux to Will Max Schwartz by deed recorded April 5, 1954, as Document No. 7190, Clark County, Nevada records; thence South $89^{\circ} 18' 00''$ West a distance of 360.00 feet to an inverted corner of the last mentioned conveyed parcel; thence South $1^{\circ} 24' 00''$ West a distance of 140.09 feet to the true point of beginning.

including the furniture, fixtures and other personal

property contained therein, upon such terms and conditions as the Court shall hereafter approve.

(4) That Harry E. Miller, Trustee herein, be, and he hereby is authorized to sell, in accordance with the terms of the Bankruptcy Act, all that certain property belonging to the estate of said bankrupts and described in full in paragraph 3 hereof, [4] supra, free and clear of the liens set forth in the petition filed on May 21, 1956 which consist of the following, to-wit:

1. State, County and City taxes for the period January 1, 1955 through June 30, 1955, now due and payable.

2. Assessment No. 100-36 for street improvement in the City of Las Vegas, the amount and method of payment of this assessment is unknown at this time.

3. That certain Claim of Lien, dated February 8, 1954 and recorded February 10, 1955, as Document No. 34962, in Book No. 40 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein Lawrence Hawthorne, doing business as Hawthorne Construction Co., a construction contractor, claims a lien against Moulin Rouge Associates, Alexander Bisno and Louis Rubin, in the sum of \$51,340.00, for work, labor and materials and services furnished and performed for the construction of the Moulin Rouge Hotel.

4. By assignment of Lien, dated October 24,

1955 and recorded November 10, 1955, as Document No. 61159, in Book No. 73 of Official Records, in the Office of the County Recorder of Clark County, Nevada, the hereinabove described Claim of Lien was assigned by Lawrence Hawthorne and Tatiana Hawthorne to D. B. Roberts, and to his executors, administrators and assigns.

5. A Trust Deed to Pioneer Title Insurance and Trust Company, a corporation, Trustee, executed by Edna Shulman, a single woman, to secure her note in the sum of \$600,000.00, which note is referred to, but not set out, in favor of Bisno & Bisno, Inc., a Nevada corporation, and to secure such other sums as may become due under the terms of said Trust Deed, dated July 9, 1954 and recorded July 12, 1954, as Document No. 14830, in Book No. 15 of Official Records, in the Office of the County Recorder of Clark County, Nevada, said Trust Deed is referred to in the Stipulation dated June 19, 1956 between the Trustee herein and Leroy Investment Co., Inc., and Rosehedge Corporation, and the terms of said Stipulation shall govern the right of the parties thereto.

6. By instrument dated April 14, 1955 and recorded April 29, 1955, as Document No. 45179, in Book No. 53 of Official Records, in the Office of the County Recorder of Clark County, Nevada, the hereinabove described Trust Deed was assigned by Bisno & Bisno, Inc., to Alexander Bisno and Louis Rubin.

7. By instrument dated April 18, 1955 and re-

corded April 29, 1955, as Document No. 45180, in Book 53 of Official Records, in the Office of the County Recorder of Clark County, Nevada, the hereinabove described Trust Deed was assigned by Louis Rubin and Alexander Bisno, to Leroy Investment Co., Inc., a California Corporation, given as collateral security for the payment of a certain promissory note executed and delivered by the Assignor to the [5] Assignee to secure the payment of the principal sum of \$250,000.00 and interest. Reference to said instrument is made for full particulars.

8. By instrument dated May 24, 1955, and recorded May 25, 1955, as Document No. 47538, in Book No. 56 of Official Records, in the Office of the County Recorder of Clark County, Nevada, the hereinabove described Trust Deed was assigned by Louis Rubin and Alexander Bisno to Rosehedge Corporation, given as collateral security for the payment of a certain note executed and delivered by the Assignor to the Assignee to secure the payment of the principal sum of \$195,000.00, and interest. Reference to said instrument is made for full particulars.

9. A Chattel Mortgage executed by Moulin Rouge by Alexander Bisno and Louis Rubin, to secure their note in the sum of \$35,327.52, with interest at the rate of 6% per annum, in favor of Chairmasters, Inc., a New York Corporation, and to secure such other sums as may become due under the terms of said Chattel Mortgage dated May 9,

1955 and recorded May 13, 1955, as Document No. 46525, in Book No. 54 of Official Records, in the Office of the County Recorder of Clark County, Nevada. No search of the records has been made to determine if the personal property covered by this Chattel Mortgage is clear of other liens. Reference to said instrument is made for full particulars.

10. A Chattel Mortgage executed by Alexander Bisno and Louis Rubin, doing business as Moulin Rouge, to secure their note in the sum of \$21,500.00, with interest from June 18, 1955 at the rate of 6% per annum, in favor of First National Bank of Nevada, a corporation, covering certain personal property situate on the hereinabove described property, and to secure such other sums as may become due under the terms of said Chattel Mortgage dated May 17, 1955 and recorded May 17, 1955, as Document No. 46777, in Book No. 55 of Official Records, and filed in File 17, in the Office of the County Recorder of Clark County, Nevada. No search of the records has been made to determine if said personal property is clear of other liens.

11. A Chattel Mortgage executed by Alexander Bisno, a married man, and Louis Rubin, a married man, General Partners, doing business as Moulin Rouge, a partnership, and Alexander Bisno, individually and Louis Rubin, individually, to secure their note in the sum of \$195,000.00, in favor of Rosehedge Corporation, a California Corporation, covering certain personal property situate on the

hereinabove described property, and to secure such other sums as may become due under the terms of said Chattel Mortgage, dated May 24, 1955 and recorded as Document No. 47539, in Book No. 56 of Official Records, in the Office of the County Recorder of Clark County, Nevada. No search of the records [6] has been made to determine if the personal property covered by this Chattel Mortgage is clear of other liens. Reference is made to said instrument for full particulars. Said instrument was recorded May 25, 1955.

12. That certain Notice of Claim of Lien, recorded June 24, 1955, as Document No. 50313, in Book No. 59 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein E. M. Kaufield and Clifford L. Kaufield, doing business as E. M. Kaufield & Son, a general partnership, claim a lien against Alexander Bisno, a married man, and Louis Rubin, a married man, general partners, doing business as Moulin Rouge, in the amount of \$9,886.57 for materials furnished for the improvement of the property covered by this report.

13. The effect of a Chattel Mortgage executed by Moulin Rouge, a Limited Partnership, Louis Rubin and Alexander Bisno, General Partners thereof, to secure their note in the sum of \$35,000.00 with interest from July 5, 1955, at the rate of 12% per annum, in favor of Millie Sterett, covering certain personal property situate on the hereinabove described property, and to secure such other sums as

may become due under the terms of said Chattel Mortgage dated July 5, 1955 and recorded July 13, 1955, as Document No. 51829, in Book No. 61 of Official Records, and filed in File 19, in the Office of the County Recorder of Clark County, Nevada. No search of the record has been made to determine if said personal property is clear of other liens. Reference to said instrument is made for full particulars.

14. That certain Notice of Claim of Lien dated July 16, 1955, and recorded July 20, 1955, as Document No. 52424, in Book No. 62 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein Home Lumber Co., of Nevada, a Nevada corporation claims a lien against the owners of the hereinabove described property for materials furnished in the sum of \$1,204.96.

15. A Trust Deed to Nevada Title Guaranty Company, a Nevada corporation, Trustee, executed by Moulin Rouge by and through Alexander Bisno and Louis Rubin, general partners, to secure their note in the sum of \$250,000.00, which note is referred to, but not set out, in favor of Jack Silverman, and to secure such other sums as may become due under the terms of said Trust Deed, dated July 27, 1955, and recorded August 9, 1955, as Document No. 54168, in Book No. 64 of Official Records, in the Office of the County Recorder of Clark County, Nevada.

16. A Chattel Mortgage executed by Moulin Rouge, a Co-partnership, to secure a note in the

sum of \$250,000.00 being also secured by a Deed of Trust of record and also to secure the additional sum of \$25,000.00, with interest at the rate of 5% per annum, until paid, in favor of Jack Silverman, and to secure such other sum as may become due [7] under the terms of said Chattel Mortgage, dated August 21, 1955, and recorded August 22, 1955, as Document No. 55158, in Book No. 65 of Official Records, and filed in File 20, in the Office of the County Recorder of Clark County, Nevada.

17. That certain Notice of Claim of Lien, wherein Western Heating and Ventilating, Inc., a Nevada corporation, claims a lien against Alexander Bisno, a married man, and Louis Rubin, a married man, general partners, doing business as Moulin Rouge, for materials and labor furnished in the buildings situate on the property covered by this report in the sum of \$31,812.37. Said instrument was recorded August 25, 1955, as Document No. 55559, in Book No. 66 of Official Records in the Office of the County Recorder of Clark County, Nevada.

18. That certain Notice of Federal Tax Lien, dated August 26, 1955 and recorded August 28, 1955, as Document No. 55676, in Book No. 66 of Official Records, and filed in File 20, in the Office of the County Recorder of Clark County, Nevada, wherein V. W. Evans, District Director of Internal Revenue claims a lien for W T-FICA and Excise Taxes for the second quarter of 1955, in the sum of \$32,559.60, against Alexander Bisno and Louis Rubin, Moulin Rouge.

19. That certain Notice of Claim of Lien recorded September 8, 1955, as Document No. 56475, in Book No. 67 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein Joseph P. Gedwill, doing business as Builders Electric Service Co., a general electrical contractor, claims a lien against Alexander Bisno, a married man and Louis Rubin, a married man, general partners, doing business as Moulin Rouge, for materials furnished in the improvement of the property covered by this report. Amount of lien is \$2,482.77.

20. That certain Notice of Claim of Lien, recorded September 15, 1955, as Document No. 56984, in Book 67 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein Clifford L. Kaufield, doing business as E. M. Kaulfield & Son, claims a lien against Alexander Bisno, a married man, and Louis Rubin, a married man, general partners, doing business as Moulin Rouge, in the sum of \$832.30, for materials and labor furnished in the improvement of the property covered by this report.

21. That certain Notice of Claim of Lien, dated September 23, 1955, and recorded September 28, 1955, as Document No. 57857, in Book No. 69 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein the State of Nevada Employment Security Department claims a lien against Alexander Bisno and Louis [8] Rubin, doing business as Moulin Rouge, in the sum

of \$4,947.70, for the Unemployment Compensation Fund of the State of Nevada.

22. That certain Notice of Claim of Lien, recorded October 10, 1955, as Document No. 58769, in Book 70 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein Wilgar Bros. Glass Co., Inc., a Nevada corporation, claims a lien against Alexander Bisno, a married man, and Louis Rubin, a married man, general partners, doing business as Moulin Rouge, and Stone Construction Co. and Orange Fixture Co., in the sum of \$4,714.87, for materials and labor furnished in the construction of a building located on the property covered by this report.

23. That certain Notice of Federal Tax Lien under Internal Revenue Laws, recorded October 11, 1955, as Document No. 58824, in Book No. 70 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein V. W. Evans, U. S. Collector of Internal Revenue for the District of Nevada, claims a lien for Excise (Cas.) for the period August and July, 1955, in the amount of \$32,403.64, against Moulin Rouge-Alexander Bisno and Louis Rubin.

24. That certain Notice of Claim of Lien, recorded October 11, 1955, as Document No. 58852, in Book No. 70 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein Vegas Heating & Sheet Metal Co., Inc., a Nevada corporation, claims a lien against Alexander Bisno and Louis Rubin, doing business as

Moulin Rouge and Edward Stone, Paul Stone and Mack Stone, doing business as Stone Construction Company, in the sum of \$1,745.70, for materials and labor furnished in the construction of a building located on the property covered by this report.

25. A Writ of Attachment issued out of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, under Case No. 74696, entitled Western Electric Displays, Inc., a Nevada corporation, Plaintiff, vs. Moulin Rouge Hotel, Inc., a corporation, Alexander Bisno and Louis Rubin, general partners, doing business as Moulin Rouge Hotel, and Sidney R. Rubin, also known as Sidney M. Dubbin, doing business as Moulin Rouge, Defendants, attaching all right, title and interest of record in the same of the Defendants, recorded October 13, 1955, as Document No. 59048, in Book No. 70 of Official Records, in the Office of the County Recorder of Clark County, Nevada. Amount of demand is \$62,375.26.

26. That certain Notice of Supplemental Claim of Lien, dated October 12, 1955, and recorded October 17, 1955, as Document No. 59263, in Book No. 70 of Official Records, in the Office of the County [9] Recorder of Clark County, Nevada, wherein the State of Nevada Employment Security Department claims a lien against Alexander Bisno and Louis Rubin, doing business as Moulin Rouge, in the sum of \$9,504.00 for the Unemployment Compensation fund of the State of Nevada.

27. That certain Notice of Claim of Lien, recorded October 19, 1955, as Document No. 59470, in Book 71 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein Paul Stone, Mack Stone and Edward Stone, a co-partnership doing business as Stone Construction Company claims a lien against Properties Moulin Rouge, Inc., a corporation in the sum of \$32,500.00, for materials and labor furnished in the construction of a building located on the property covered by this report.

28. That certain Notice of Federal Tax Lien under Internal Revenue Laws, recorded October 24, 1955, as Document No. 59708, in Book No. 71 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein V. W. Evans, U. S. Collector of Internal Revenue for the District of Nevada, claims a lien for excise and WT-FICA Taxes in the amount of \$55,163.37, against Moulin Rouge Hotel, Inc.

29. That certain Notice of Federal Tax Lien under Internal Revenue Laws, recorded October 24, 1955, as Document No. 59709, in Book No. 71 Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein V. W. Evans, U. S. Collector of Internal Revenue for the District of Nevada, claims a lien for WT-FICA taxes for the third quarter of 1955, in the amount of \$67,350.11, against A. Bisno and L. Rubin - Moulin Rouge.

30. That certain Notice of Claim of Lien, re-

corded October 24, 1955, as Document No. 59734, in Book No. 71 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein Joseph G. Roberts and Frank Scott, doing business as Roberts Roof and Floor Company, claims a lien against Moulin Rouge Hotel, in the sum of \$154.00 for materials and labor furnished in the construction of a building located on the property covered by this report.

31. That certain Notice of Claim of Lien, recorded October 26, 1955, as Document No. 59865, in Book No. 71 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein Harold R. Adams, doing business as Rexford Supply Company, claims a lien against the Moulin Rouge Hotel and Alexander Bisno, a married man and Louis Rubin, a married man, general partners doing business as the Moulin Rouge Hotel, in the sum of \$98.42, for materials furnished in the construction of a building located on the property covered by this report. [10]

32. That certain Notice of Federal Tax Lien under Internal Revenue Laws, recorded November 15, 1955, as Document No. 61460, in Book No. 73 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein V. W. Evans, U. S. Collector of Internal Revenue for the District of Nevada, claims a lien for WT-FICA and Excise Taxes in the amount of \$133,691.80, against Moulin Rouge Partnership consisting of George C. Altman, et al.

33. That certain Notice of Claim of Lien, recorded November 15, 1955, as Document No. 61461, in Book No. 73 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein M. J. Disiase, Paint Contractor, claims a lien against the Moulin Rouge Hotel, a general partnership comprised of Alexander Bisno, a married man, and Louis Rubin, a married man, doing business as the Moulin Rouge, now doing business and known as the Moulin Rouge Properties, Inc., in the sum of \$1,327.15, for materials furnished in the construction of a building located on the property covered by this report.

34. The effect of that certain Mechanic's Lien, recorded April 20, 1955, as Document No. 44396, in Book No. 52 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein Mehring and Hanson Company claims a lien against Alexander Bisno and Louis Rubin, in the sum of \$5,825.58, for materials furnished in the construction of a building located on the property covered by this report.

35. That certain Amended Notice of Claim of Lien, recorded November 17, 1955, as Document No. 61749, in Book No. 73 of Official Records, in the Office of the County Recorder of Clark County, Nevada, wherein Paul Stone, Mack Stone and Edward Stone, a co-partnership, doing business as Stone Construction Company, claims a lien against Properties Moulin Rouge, Inc., a corporation, in the sum of \$32,500.00 for materials and labor fur-

nished in the construction of a building located on the property covered by this report.

(5) That the liens listed in Paragraph 4 hereof, supra, be, and the same hereby are transferred to the net proceeds of the sale of the property covered by said liens, subject, however to the terms of the Stipulation dated June 19, 1956 between Trustee and Leroy Investment Co., Inc. and Rosehedge Corporation, which is made a part of this order.

(6) That the actual cost of insurance premiums and the actual and necessary costs and expenses of preservation of the [11] estate, incurred since the filing of the petitions in bankruptcy, including the actual and necessary costs and expenses of the sale of the property described in paragraph 3 hereof, shall be entitled to priority over, and shall be prior to the liens described in paragraph 4 hereof, supra, and to the claims of general creditors of the bankrupts.

/s/ JOHN C. MOWBRAY,
Referee In Bankruptcy. [12]

[Stamped]: Received and Filed July 6, 1956.
John C. Mowbray, Referee in Bankruptcy.

[Endorsed]: Filed October 19, 1957.

[Title of District Court and Cause.]

PROOF OF CLAIM IN BANKRUPTCY—
AS A SECURED CLAIM

State of California,
County of Los Angeles—ss.

Millie Sterett, of No. 2210 Linnington Avenue,
in Los Angeles, County of Los Angeles, State of
California, being duly sworn, deposes and says:

If Claimant Is An Individual:

1 (a). That he is the claimant herein.

2. That the above-named bankrupt (or debtor)
was at and before the filing by (or against) him of
the petition herein (for adjudication of bank-
ruptcy), and still is, justly and truly indebted (or
liable) to said deponent (or co-partnership or cor-
poration), in the sum of Thirty-Five Thousand and
No/100 dollars (\$35,000.00), plus interest.

3. That the consideration of said debt (or lia-
bility) is as follows:

Money loaned evidenced by Promissory Note and
secured by Chattel Mortgage as per annexed certi-
fied copy.

* * * * *

6. That deponent (or said co-partnership or said
corporation) does not hold, and has not, nor has
any person by his (or its) order, or to deponent's
knowledge or belief, for his (or its) use, had or
received, any security or securities for said debt
(or liability), except Chattel Mortgage, certified

copy of which is hereto annexed and made a part hereof.

7. [If the debt or liability is found upon an instrument of writing.] That the instrument upon which said debt (or liability) is founded is attached hereto (or is lost or destroyed, as set forth in the affidavit attached hereto).

8. [If the debt is founded upon an open account.] That the said debt was (or will become) due on October 5, 1955 (or that the average date thereof is); that no note, or other negotiable instrument, has been received for such account, or any part thereof (or that the said debt is evidenced by a note, or other negotiable instrument, which is attached hereto); and that no judgment has been rendered thereon, except Promissory Note as per annexed copy and Chattel Mortgage as per annexed certified copy.

9. This claim is filed as a Secured Claim.

Undersigned creditor does not waive security.

/s/ MILLIE STERETT.

Subscribed and sworn to before me this 10th day of July, 1956.

[Seal] /s/ SHIRLEY F. ARON,
Notary Public in and for said County and State.
My Commission Expires March 4, 1960.

[Note: Promissory Note is the same as set out in the Mortgage of Chattels at page 24 of this printed record.]

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Mortgage of Chattels

This Mortgage, Made this 5th day of July, 1955 by Moulin Rouge, a Limited Partnership, Louis Rubin and Alexander Bisno, General Partners thereof, of Las Vegas, County of Clark, State of Nevada, Mortgagor, to Millie Sterett of Los Angeles, County of Los Angeles, State of California, Mortgagee,

Witnesseth: That the Mortgagor mortgages to the Mortgagee all that certain personal property situated and described as follows, to wit:

All furniture and furnishings and equipment now, at the time of the execution hereof, and hereafter until payment in full of the obligation secured hereby situate in the main building, and rooms thereof, of the Moulin Rouge Hotel, 900 West Bonanza Road, City of Las Vegas, County of Clark, State of Nevada, each of said rooms (said rooms consisting of 105 in number, exclusive of the main building, Casino and Dining Room), at the time hereof, containing the following, to wit:

- | | |
|---------------------|----------------|
| 1 Chest-desk | 1 Floor Lamp |
| 1 Desk Chair | 1 Headboard |
| 1 Overstuffed Chair | 2 Box Springs |
| 2 Night Stands | 2 Mattresses |
| 1 Coffee Table | 2 Metal Frames |
| 2 Table Lamps | 2 Pictures |

the main building, Casino and Dining Room containing, in general, the following, to wit:

All the carpeting in the Main Building, Casino and Dining Room
as security for the payment to Mortgagee of Thirty Five Thousand and No/100 (\$35,000.00) Dollars according to the terms and conditions of a certain Promissory Note, of even date herewith substantially in form as follows:

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\$35,000.00, Las Vegas, Nevada, July 5, 1955.

Ninety (90) days after date, for value received, We promise to pay to Millie Sterett, or order, at 2210 Linnington Avenue, Los Angeles, California the sum of Thirty Five Thousand and No/100 Dollars, with interest from July 5, 1955 until paid, at the rate of 12% per cent per annum, payable At Maturity.

Should default be made in payment of interest when due the whole sum of principal and interest shall become immediately due at the option of the holder of this note. Principal and interest payable in lawful money of the United States. If action be instituted on this note We promise to pay such sum as the Court may fix as attorney's fees. This note is secured by a Mortgage of Chattels.

Moulin Rouge,

A Limited Partnership,

Louis Rubin and Alexander Bisno,

General Partners thereof,

/s/ By Louis Rubin,

General Partner,

By Alexander Bisno,

General Partner.

This mortgage also secures: (a) any and all renewals of said promissory note; (b) the repayment of all sums and amounts that may be necessarily advanced or expended by Mortgagee for the maintenance or preservation of the mortgaged property, or any part thereof; (c) to the maximum extent and amount of Dollars (\$.....), any and all other sums that may hereafter be advanced by Mortgagee to or for the benefit of Mortgagor, any and all other expenditures that may hereafter be made by Mortgagee pursuant to the provisions hereof or for the benefit of or at the instance of Mortgagor, and any and all other indebtednesses and obligations of Mortgagor to Mortgagee that may hereafter be incurred.

Said mortgagor promises that he will, during the continuance hereof, keep the mortgaged property in good condition and repair; and further that he will not remove, nor permit to be removed, any part of said property from the above premises without the written consent of the Mortgagee first had and obtained; and further that he will provide, maintain and deliver to Mortgagee satisfactory fire and other insurance policies covering said property in amounts and companies satisfactory to Mortgagee and with loss, if any, payable to the Mortgagee, as his interest may appear.

The said mortgagor hereby declares and warrants to the mortgagee that he is the absolute and sole owner, and is in possession, of all said mortgaged

property, and that the same is free and clear of all liens, encumbrances and adverse claims.

It is further agreed that, if said mortgagor shall fail to make payment of any part of the principal or interest as provided in said promissory note at the time and in the manner therein specified, or if any breach be made of any obligation or promise of the said mortgagor herein contained or secured hereby, then the whole principal sum unpaid on said promissory note, with interest accrued thereon, shall immediately become due and payable, at the option of mortgagee; and the said mortgagee may at once proceed to foreclose this mortgage according to law; or the said mortgagee may, at his option, and he is hereby empowered so to do, enter upon the premises where the said mortgaged property may be and take possession thereof, and remove, sell and dispose of the same, and from the proceeds of sale retain all costs and charges incurred by him in the taking or sale of said property, including any reasonable attorney's fees thereby incurred; also, he may take all sums due him on said promissory note under any provisions hereof, including reasonable attorney's fees; and any surplus of such proceeds remaining shall be paid to the mortgagor.

It is further agreed that upon any sale of the mortgaged property according to law, or under the power herein given, that the said mortgagee may bid on the said sale, or make a purchase of the said mortgaged property, or any part thereof.

51829 (5-3)

Book 61

Wherever herein the word "Mortgagor" appears, it shall and does denote Moulin Rouge, a Limited Partnership whereof Alexander Bisno and Louis Rubin are the General Partners, including the entire of the right, title, interest and estate of the said Alexander Bisno and said Louis Rubin; the word "he" with reference to the Mortgagor refers to said Partnership and the aforesaid General Partners.

This Mortgage of Chattels is executed in behalf of Mortgagor by Louis Rubin, one of the two General Partners thereof. The said Louis Rubin does hereby represent and warrant unto the Mortgagee that he does have the authority, power and capacity to execute this Mortgage of Chattels in behalf of said Moulin Rouge, a Limited Partnership, and that this Mortgage of Chattels does constitute a valid subsisting first lien upon all of the property mortgaged hereby.

In this Mortgage, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number the plural.

In Witness Whereof, the Mortgagor has executed this instrument.

Moulin Rouge,

A Limited Partnership,

Alexander Bisno and Louis Rubin,

General Partners,

By Alexander Bisno,

General Partner,

/s/ By Louis Rubin,

General Partner.

51829 (5-4)

Book 61

Mortgage of Chattels

When Recorded Mail To Millie Sterett, 2210 Lin-
nington, Los Angeles 64, Calif.

51829 (5-5)

Book 61

State of Nevada,
County of Clark—ss.

On this 5th day of July, 1955, before me, Thomas A. Foley, a Notary Public in and for said County and State, personally appeared Louis Rubin, known to me to be, and proved to me on the oath of the said Louis Rubin to be, one of the General Partners of the Partnership that executed the within instrument, and acknowledged to me that such Partnership executed the same.

Witness my hand and Official Seal.

[Seal] /s/ Thomas A. Foley,
Notary Public in and for said County and State.
My Commission Expires May 8, 1957.

Certification of Copy

State of Nevada,
County of Clark—ss.

I, Paul C. O'Malley, the duly elected, qualified and acting Recorder of Clark County, in the State of Nevada, do hereby certify that the attached is a true, full and correct copy of the original Mortgage of Chattels against Moulin Rouge, a Limited Partnership.

Filed July 13, 1955 in file 61 No. 51829 of official records now on file and of record in this office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of my office, in Las Vegas, Nevada, this 25th day of June, A.D. 1956.

[Seal] Paul C. O'Malley,
County Recorder,

/s/ By M. Mankiewicz,
Deputy.

[Stamped]: Received and Filed July 13, 1956.
John C. Mowbray, Referee in Bankruptcy.

[Title of District Court and Causes.]

BID

To the Honorable John C. Mowbray, Referee:

The undersigned, S. Kohn, by and through her duly authorized attorneys, Messrs. Charles J. Katz, Esquire, and Robert J. Magdlen, Esquire, hereby offers to purchase all of the real property, together with the improvements thereon situated (which real property is more particularly described in Exhibit "1" hereto) for the sum of \$116,000.00, cash, free and clear of and from all liens, claims and encumbrances, excepting the following:

1. State, County and City Taxes for the period January 1, 1955 through June 30, 1955, and to date now due and payable, or owing though not now payable. [13]

2. Assessment No. 100-36 for street improvement in the City of Las Vegas, the amount and method

of payment of this assessment is unknown at this time.

3. A trust deed to Pioneer Title Insurance and Trust Company, a corporation, Trustee, executed by Edna Shulman, a single woman, to secure her note in the sum of \$600,000.00, which note is referred to, but not set out, in favor of Bisno & Bisno, Inc., a Nevada Corporation, and to secure such other sums as may become due under the terms of said trust deed, dated July 9, 1954 and recorded July 12, 1954, as Document No. 14830, in Book No. 15 of Official Records, in the Office of the County Recorder of Clark County, Nevada, said Trust Deed is referred to in the Stipulation dated June 19, 1956 between the Trustee herein and LeRoy Investment Co., Inc. and Rosehedge Corporation, and the terms of said Stipulation shall govern the right of the parties thereto.

4. By instrument dated April 14, 1955 and recorded April 29, 1955, as Document No. 45179, in Book No. 53 of Official Records, in the Office of the County Recorder of Clark County, Nevada, the hereinabove described Trust Deed was assigned by Bisno & Bisno, Inc. to Alexander Bisno and Louis Rubin.

5. By instrument dated April 18, 1955 and recorded April 29, 1955, as Document No. 45180, in Book 53 of Official Records, in the Office of the County Recorder of Clark County, Nevada, the hereinabove [14] described Trust Deed was assigned by Louis Rubin and Alexander Bisno, to LeRoy Investment Co., Inc., a California corpora-

tion, given as collateral security for the payment of a certain promissory note executed and delivered by the assignor to the Assignee to secure the payment of the principal sum of \$250,000.00 and interest. Reference to said instrument is made for full particulars.

8. By instrument dated May 24, 1955 and recorded May 25, 1955, as Document No. 47538, in Book No. 56 of Official Records, in the Office of the County Recorder of Clark County, Nevada, the hereinabove described Trust Deed was assigned by Louis Rubin and Alexander Bisno to Rosehedge Corporation, given as collateral security for the payment of a certain note executed and delivered by the Assignor to the Assignee to secure the payment of the principal sum of \$195,000.00, and interest, reference to said instrument is made for full particulars.

being sub-paragraphs 1, 2, 5, 6, 7, and 8 of paragraph (4) of that certain Order for Sale on file herein and dated July 6, 1956.

Additionally and for the same consideration and as a part of this transaction, there shall be conveyed to the purchaser, by bill of sale, all of the right, title, interest and estate of the Trustee herein in and to all of the furniture, furnishings, gaming equipment of all kinds, and all other tangible personal property pertaining to the business of the Moulin Rouge; but, subject, however, to all valid and subsisting conditional sales contracts and chattel mortgages against said personal property.

Upon acceptance of this offer, the purchaser shall be let into peaceable possession of all of said assets pending the closing of the aforesaid escrow.

The foregoing sale of real property shall be consummated through an escrow to be opened upon the acceptance of said bid by the Court and the purchase price will be paid through escrow, and purchaser shall obtain a policy of title insurance guaranteeing title to be free and clear, except as aforesaid.

Dated: 9/6, 1957.

/s/ S. KOHN. [15]

EXHIBIT No. 1

The real property referred to and covered by the foregoing bid are those certain premises known as 900 W. Bonanza Road, Las Vegas, Clark County, Nevada, and more particularly described as follows, to wit:

“That portion of the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section 28, Township 20 South, Range 61 East, M.D.B. & M., Described as follows:

Commencing at the Southeast corner of the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section 28; thence north $2^{\circ} 50'40''$ East a distance of 50.09 feet to a point; thence South $89^{\circ} 18'00''$ West along the North line of Bonanza Road a distance of 363.86 feet to the true point of beginning; thence continuing South $89^{\circ} 18'00''$ West a distance of 533.00 feet to the South-

east corner of that certain parcel of land conveyed by Edna Shulman to Alfred R. Child et ux by deed recorded January 19, 1955, as Document No. 32228, Clark County, Nevada records; thence North $1^{\circ} 24' 00''$ East a distance of 153.49 feet to a point; thence north $43^{\circ} 36' 30''$ West a distance of 48.03 feet to a point; thence North $1^{\circ} 24' 00''$ East a distance of 146.30 feet to the Northeast corner of said conveyed parcel; thence North $89^{\circ} 18'$ East a distance of 926.99 feet to a point; thence South $1^{\circ} 24' 00''$ West a distance of 194.78 feet more or less to a Southeast corner of that certain parcel of land conveyed by J. A. Haggard et ux to Will Max Schwartz by deed recorded April 5, 1954, as Document No. 7190, Clark County, Nevada records; thence South $89^{\circ} 18'$ West a distance of 360.00 feet to an inverted corner of the last mentioned conveyed parcel; thence South $1^{\circ} 24' 00''$ West a distance of 140.09 feet to the true point of beginning. [16]

[Stamped]: Received and Filed Sept. 6, 1957.
John C. Mowbray, Referee in Bankruptcy.

[Endorsed]: Filed October 19, 1957.

[Title of District Court and Causes.]

ORDER

(1) Granting Motion of LeRoy Investment Co., Inc., a Corporation, and Rosehedge Corporation, a Corporation, for Leave to Proceed With Sale Under Pledge Sale, etc.,

(2) Overruling and Denying the Objections of Trustee to Said Motion;

(3) Upholding the Validity of the Pledges, and the Liens Thereof, of LeRoy Investment Co., Inc. and Rosehedge Corporation;

(4) Upholding the Validity and Lien of the Pledged Property (i.e.) Promissory Note Dated July 9, 1954, and Deed of Trust of Same Date, and Recorded as Document No. 14830 on July 12, 1954, in Book 15, Official Records, of Clark County, Nevada; [17]

(5) And Other Relief.

The Motion of LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, For Leave to Proceed with Sale Under Pledge Sale and Sale Under Power of Sale Contained in Deed of Trust, and the Objections thereto, of the Receiver, (and now Trustee) Harry E. Miller, came on regularly to be heard before the Honorable John C. Mowbray, Referee in Bankruptcy, on the 12th day of March, 1956, at the Courthouse in Las Vegas, Nevada: LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, appearing by their counsel, Charles J. Katz, Esquire, William R. Ruymann, Esquire, and Samuel W. Blum, Esquire, and the Receiver (and now Trustee), Harry F. Miller, appearing in person and by his counsel, Messrs. Morse, Graves and Compton, and Messrs. Quittner and Stutman, by Harold Horse, Esquire, and Francis F. Quittner, Esquire; and also appearing at said proceeding

were Morton Galane, Esquire, appearing for the Creditors Committee; John S. Halley, Esquire, appearing for the Debtors, and later Bankrupts, Messrs. Foley and Foley, by Tom A. Foley, Esquire, appearing in association with John S. Halley, Esquire, for Debtors and later Bankrupts, and Max Fink, Esquire, appearing for Jack Silverman, a holder of an encumbrance upon the property herein involved, and the trial upon the said Motion and Objections having proceeded on said date, and thereafter, having been continued for further hearing and trial, from time to time, and having been tried on the various days as designated by the Court, until the trial of said matters was fully completed; and evidence, both oral and documentary, having been offered and introduced by, and on behalf of, the Moving Parties, and the Objector thereto, and the matter having been fully argued by the attorneys for the Moving Parties and the Objector, and the said Motion and the Objections thereto having been submitted to and by the Court for deliberation [18] and decision; and it further appearing that heretofore, an Order of Adjudication was duly made and entered herein in each of the above entitled proceedings; and that pending determination of the aforesaid Motion and Objections, the Court, on or about the 6th day of July, 1956, made and entered its "Order for Sale of Property and Order Authorizing Sale of Property Free and Clear of Liens", providing, among other things, for the sale of the real property hereinafter described, and that the said liens and lien rights of

the various lien claimants, including the liens and lien rights claimed, held, possessed, asserted and owned by LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, be transferred to the proceeds derived from such sale, or the sales, in the amounts, order and priority, and with the same rights, benefits and privileges as then claimed, owned, possessed and asserted by LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, and each of them, subject, however, to the terms and provisions of a certain Stipulation dated June 19, 1956 between the Trustee and LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, and which Stipulation was made a part of the aforesaid Order, and provided, among other things, that said sale, or sales, to be made would be without prejudice to the rights, claims, liens and security asserted, claimed, held or possessed by LeRoy Investment Co., Inc., a corporation, and Rosehedge corporation, a corporation, and each of them, or to any of the objections or defenses claimed or asserted by the Receiver or Trustee to the aforesaid Motion, and further provided that the Court should nevertheless hear and determine the aforesaid Motion and the Objections thereto; and written Findings of Fact and Conclusions of Law having been duly waived herein by the parties hereto by stipulation made in open Court, and entered on the minutes; the [19] Court now makes its Order determining the aforesaid Motion and Objections thereto as follows:

Now, Therefore, Good Cause Appearing, It Is Hereby Ordered, Adjudged and Decreed, As Follows:

1. That the Motion of LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, For Leave to Proceed with Sale Under Pledge Sale and Sale Under Power of Sale Contained in Deed of Trust, be, and the same is hereby granted.

2. That the Objections of the Receiver and Trustee, Harry E. Miller, to the aforementioned Motion of LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, be, and they are, and each of them is hereby overruled, and said Objections are, and each of them is hereby denied.

3. That LeRoy Investment Co., Inc., a corporation, is now the actual and lawful owner and holder of a certain promissory note dated April 27, 1955 and signed and executed by Louis Rubin and Alexander Bisno in the principal sum of \$250,000.00, payable on or before August 27, 1955 and bearing interest at the rate of $11\frac{1}{2}\%$ per annum; and there is now due, owing and unpaid upon the said promissory note to Leroy Investment Co., Inc. the following sums, to wit:

For the account of the principal on said note—
\$225,000.00.

For interest on said note at the rate of 6% per annum from August 8, 1955 to date hereof—
\$28,087.50.

For attorney fees for attorneys for LeRoy Invest-

ment Co., Inc. which is hereby allowed by the Court in the sum of—\$15,750.00.

For LeRoy Investment Co., Inc.'s costs and expenses laid out, incurred and expended [20] by it for the preservation or protection of the real property, and for costs and disbursements incurred herein, which is hereby allowed by the Court in the sum of—\$3,885.00.

Making in all a total sum of—\$272,722.50.

and that the aforesaid total sum shall bear interest at the rate of 6% per annum from date hereof, until paid.

That the aforesaid sums are, and each of them is, secured by a valid first pledge of certain personal property, hereinafter described, pledged and delivered by Louis Rubin and Alexander Bisno, the then owners and holders of said personal property, to LeRoy Investment Co., Inc., a corporation, on the 29th day of April, 1955, to secure, and as security for the aforementioned promissory note, and all sums payable thereunder, and under that certain assignment and pledge agreement executed by Louis Rubin and Alexander Bisno, and duly recorded on the 29th day of April, 1955, as Document No. 45180, in Book 53 of Official Records in the Office of the County Recorder, Clark County, Nevada; that the aforesaid pledge is valid, subsisting, and enforceable, and constitutes a valid, subsisting and enforceable pledge of, and a first lien upon the following personal property, to wit: (a) That certain prom-

issory note, dated July 9, 1954, executed by Edna Shulman, as maker, and payable to Bisno & Bisno, Inc., or order, in the principal sum of \$600,000.00, with interest at the rate of 6% per annum from December 1, 1954 on unpaid principal, payable monthly; and principal payable in installments of \$10,000.00, or more, on the 1st day of each consecutive month, commencing on the 1st day of June, 1955, and continuing until said principal and interest has been paid; and (b) That certain deed of trust dated [21] July 9, 1954 and executed by Edna Shulman, a single woman, as Trustor, to the Pioneer Title Insurance and Trust Company, a California corporation, and qualified to do business in the State of Nevada, as Trustee, and to Bisno & Bisno, Inc., a Nevada corporation, Beneficiary, and recorded as Document No. 14830 on July 12, 1954 in Book No. 15 of the Official Records in the Office of the County Recorder of Clark County, Nevada, and covering the real property hereinafter described. Said deed of trust was given as security for and to secure the payment and performance of the afore-said \$600,000.00 promissory note. The Court adjudges that the balance owing and unpaid upon said \$600,000.00 note and trust is the sum of the amounts herein adjudged to be due and owing to LeRoy Investment Co. Inc. and to Rosehedge Corporation. That the said LeRoy Investment Co., Inc., a corporation, is now the lawful pledgee and pledge-holder of the said \$600,000.00 promissory note and deed of trust securing the same and now is holding the possession of the same, and each of them, as

pledgee. That the said pledge to LeRoy Investment Co., Inc., a corporation, and the lien thereof are, and each of them is valid, subsisting, and binding upon and enforceable against the Receiver and Trustee herein, and the above entitled bankrupt estates.

4. That Rosehedge Corporation, a corporation, is now the actual and lawful owner and holder of a certain promissory note dated May 24, 1955, and executed by Moulin Rouge, a Partnership, by Louis Rubin and Alexander Bisno, individually, in the principal sum of \$195,000.00 and bearing interest at the rate of 6% per annum; principal and interest payable in installments of \$7500.00, or more, on Wednesday of each week, commencing June 1, 1955, and continuing until the full amount of principal and interest has been paid; that there is now due, owing and unpaid to Rosehedge Corporation, a corporation, upon the aforesaid promissory note the following sums:

For the account of principal on said note—
\$126,928.66.

For interest on said note at the rate of 6% per annum from August 27, 1955 to date hereof—
\$15,442.99. [22]

For attorney fees for attorneys for Rosehedge Corporation, a corporation, which is hereby allowed by the Court in the sum of —\$8,890.00.

For Rosehedge Corporation's costs and expenses laid out, incurred and expended by it for the preservation or protection of the real property

and for costs and disbursements incurred herein, which is hereby allowed by the Court in sum of—\$3585.00.

Making in all a total sum of—\$154,846.65.

and that the aforesaid total sum shall bear interest at the rate of 6% per annum from date hereof until paid.

That the aforesaid sums are, and each of them is secured by a valid pledge of certain personal property, hereinafter described, pledged and delivered by Louis Rubin and Alexander Bisno, the then owners and holders of said personal property, to Rosehedge Corporation, a corporation, subject to the prior pledge of LeRoy Investment Co., Inc. as hereinbefore set forth, to secure, and as security for the payment of the aforementioned promissory note; and all sums payable thereunder, and under the certain assignment and pledge agreement executed by Alexander Bisno and Louis Rubin, the owners and holders of the personal property hereinafter described, and duly recorded on the 25th day of May, 1955 as Document No. 47538 in Book No. 56 of Official Records in the Office of the County Recorder of Clark County, Nevada; that at said time of the creation of the aforesaid pledge the said pledged personal property was then in the possession of LeRoy Investment Co., Inc., a corporation, as pledge-holder under its pledge as hereinbefore set forth, and no further, or other delivery of possession of the said pledged personal property was required to create a valid pledge in favor [23] of

Rosehedge Corporation, a corporation, as aforesaid, and that immediately following the pledge to Rosehedge Corporation, a corporation, written notice of said pledge was given to LeRoy Investment Co., Inc., a corporation, by Rosehedge Corporation, a corporation; that the aforesaid pledge to Rosehedge Corporation, a corporation, is a valid, subsisting and enforceable pledge, and constitutes a valid and enforceable pledge of, and a lien upon, said personal property hereinafter mentioned, which pledge and lien is subject and junior only to the Pledge given to LeRoy Investment Co., Inc., a corporation, as hereinbefore mentioned and set forth in the preceding paragraph No. 3 hereof; that said pledged personal property consists of the following personal property, to wit: (a) That certain promissory note dated July 9, 1954, executed by Edna Shulman, as maker, and payable to Bisno & Bisno, Inc., or order, in the principal sum of \$600,000.00, with interest at the rate of 6% per annum, from December 1, 1954, on unpaid principal, payable monthly; and principal payable in installments of \$10,000.00, or more, on the 1st day of each consecutive month commencing on the 1st day of June, 1956, and continuing until said principal and interest has been paid; and (b) that certain deed of trust, dated July 9, 1954, and executed by Edna Shulman, a single woman, as Trustor, to the Pioneer Title Insurance and Trust Company, a California corporation, and qualified to do business in the State of Nevada, as Trustee, and to Bisno & Bisno, Inc., a Nevada corporation, Beneficiary, recorded as Document No.

14830 on July 12, 1954 in Book No. 15 of the Official Records in the Office of the County Recorder, Clark County, Nevada, and covering the real property hereinafter described. That the said Rosehedge Corporation, a corporation, is the lawful pledgee and pledge-holder of the said \$600,000.00 promissory note and deed of trust securing the same, subject only to the prior and superior rights and possession of the same, by [24] LeRoy Investment Co., Inc., a corporation, as pledgee, as hereinbefore set forth. That the possession of LeRoy Investment Co., Inc., a corporation, as pledgee, of the aforesaid promissory note and deed of trust, also constitutes the possession of the said promissory note and deed of trust for and on behalf of Rosehedge Corporation, a corporation, as subsequent pledgee of the said promissory note and deed of trust, subject and subordinate only to the prior pledge, rights, and possession of LeRoy Investment Co., Inc., a corporation, as hereinbefore set forth. That the said pledge to Rosehedge Corporation, a corporation, and the lien thereof, and each of them is valid, subsisting and binding upon and enforceable against the receiver and Trustee herein, and the above entitled bankrupt estates.

5. That the aforementioned promissory note dated July 9, 1954, and executed by Edna Shulman, as maker, to Bisno & Bisno, Inc., or order, is a valid, subsisting, binding and enforceable promissory note, supported by adequate and legal consideration, and without any infirmities or defenses thereto, and is binding upon and enforceable

against the Receiver and Trustee herein, and the above entitled bankrupt estates; that the entire amount of principal of said promissory note, and the interest thereon, in accordance with the terms and tenor of said promissory note, is now due, owing and unpaid; that the said promissory note is secured by that certain deed of trust, executed by Edna Shulman, a single woman, as Trustor, to Pioneer Title Insurance and Trust Company, a California corporation, qualified to do business in the State of Nevada, as Trustee, and to Bisno & Bisno, Inc., a Nevada corporation, as Beneficiary, and covering the real property hereinafter described, and was recorded on July 12, 1954, as Document No. 14830, in Book No. 15 of Official Records, in the Office of the County Recorder of Clark County, Nevada; that said Deed of trust is a valid, subsisting, binding and enforceable [25] deed of trust, and said deed of trust, and the lien thereof, are, and each is binding upon and enforceable against the Receiver and Trustee herein, the above entitled bankrupt estates, and the real property hereinafter described; that said deed of trust created, and creates, and now constitutes a valid, subsisting and enforceable first lien upon the said real property hereinafter described, and said real property is subject to and charged and burdened with, said first lien and the aforesaid deed of trust, in the amounts, and in accordance with the terms and tenor of the aforementioned promissory note of \$600,000.00, and the terms and provisions of the said deed of trust.

6. That the liens and lien rights, of LeRoy Investment Co., Inc., a corporation, and Rosehedge

Corporation, a corporation, and the amounts adjudicated to be due, owing, and unpaid to LeRoy Investment Co., Inc., a corporation, and to Rosehedge Corporation, a corporation, as hereinbefore set forth, shall be and are subject only to the following priorities, and none others:

(a) State, County and City real estate taxes now due, owing, and unpaid upon the hereinafter described real property, or which constitute a lien upon the real property hereinafter described, but which may not yet be due and payable.

(b) In the event, and upon the condition that the real property hereinafter described is sold by this Court pursuant to and as provided by its Order of Sale, now on file herein and dated July 6, 1956, and the liens and lien rights of Leroy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, are transferred to the net proceeds of said sale, then the liens and lien rights of LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, shall be subject [26] to the additional following priority, to wit: The actual and necessary costs and expenses of preservation of the estate herein, remaining unpaid, including the actual and necessary costs and expenses of the sale of the real property hereinafter described, and the costs of administration herein, as fixed by the Court, but in an amount not to exceed the sum of \$116,000.00 as the combined total of all of the foregoing. But if the said real property is not sold by this Court, as aforesaid, then the foregoing priority in an amount not to exceed the sum of \$116,000.00, as provided by the foregoing provi-

sions of this subdivision (b) of this paragraph 6 of this Order shall not be applicable and shall not apply, and in such event, only the priority as fixed and determined by sub-paragraph (a) hereof, and the priority as fixed and determined by the Order of Sale, on file herein, and dated July 6, 1956, and none others, shall apply, and shall be applicable herein, to wit: Only the actual costs of insurance premiums, and the actual and necessary costs and expenses of preservation of these estates incurred since the filing of the petition herein, including the actual and necessary costs and expenses incurred for and in connection with the sale of the real property hereinafter described, shall be entitled to priority over, and shall be prior to the liens, and lien rights of LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, and to the amounts adjudicated to be due, owing and unpaid to LeRoy Investment Co., Inc., a corporation, and Rosehedge [27] Corporation, a corporation, as hereinbefore set forth, and all costs of administration, and all fees, and all other costs, charges, and burdens of the above entitled bankrupt estates shall be, and are subsequent and inferior to the liens and lien rights of LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, and to the amounts adjudicated to be due, owing and unpaid to LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, and each of them, as hereinbefore set forth.

7. That the real property hereinafter described

shall first be offered for sale by this Court pursuant to, and in accordance with, and as provided by that certain Order of Sale dated July 6, 1956, and if said real property be so sold, then the liens, claims and rights of LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, herein determined, shall be transferred to the net proceeds of said sale, and LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation, shall be paid in full the sums herein determined to be due, owing and unpaid to them, and each of them; but if the said real property be not so sold by this Court, within days hereof, then LeRoy Investment Co., Inc. and Rosehedge Corporation be, and they are, and each of them is, hereby authorized to proceed with the sale of said pledged property, and with the sale of said real property under the Power of Sale contained in the aforementioned deed of trust, all as provided by, and in accordance with the terms and provisions of said Pledge and Pledge Agreement, the Power of Sale contained in the deed of trust hereinbefore mentioned, and the various provisions of law applicable thereto. [28]

8. That the real property referred to herein, and affected hereby, and subject to the lien of the deed of trust hereinbefore mentioned, is that certain real property situate in the City of Las Vegas, County of Clark, State of Nevada, covering the premises known as:

“That portion of the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section 28,

Township 20 South, Range 61 East, M.D.B. & M., described as follows:

Commencing at the Southeast corner of the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section 28; thence north $2^{\circ} 50' 40''$ East a distance of 50.09 feet to a point; thence South $89^{\circ} 18' 00''$ West along the North line of Bonanza Road a distance of 363.86 feet to the true point of beginning; thence continuing South $89^{\circ} 18' 00''$ West a distance of 533.00 feet to the Southeast corner of that certain parcel of land conveyed by Edna Shulman to Alfred R. Child et ux by deed recorded January 19, 1955, as Document No. 32228, Clark County, Nevada records; thence North $1^{\circ} 24' 00''$ East a distance of 153.49 feet to a point; thence north $43^{\circ} 36' 30''$ West a distance of 48.03 feet to a point; thence North $1^{\circ} 24' 00''$ East a distance of 146.30 feet to the Northeast corner of said conveyed parcel; thence North $89^{\circ} 18'$ East a distance of 926.99 feet to a point; thence South $1^{\circ} 24' 00''$ West a distance of 194.78 feet more or less to a Southeast corner of that certain parcel of land conveyed by J. A. Haggard et ux to Will Max Schwartz by deed recorded April 5, 1954, as Document No. 7190, Clark County, Nevada records; [29] thence South $89^{\circ} 18'$ West a distance of 360.00 feet to an inverted corner of the last mentioned conveyed parcel; thence South $1^{\circ} 24' 00''$ West a distance of 140.09 feet to the true point of beginning;"

Dated this 6th day of September, 1957.

/s/ JOHN C. MOWBRAY,

Referee in Bankruptcy.

We, and each of us, do hereby waive written Findings of Fact and Conclusions of Law in connection with the foregoing proceeding, and do hereby waive any and all rights of review, of the foregoing Order, and any and all rights of appeal therefrom, and do hereby consent to the entry of the aforesaid Order without further notice or motion.

HARRY E. MILLER,

Trustee and Receiver,

By MORSE, GRAVES AND

COMPTON, and

QUITTNER AND STUTMAN,

/s/ By FRANCIS F. QUITTNER,

Attorneys for Receiver and Trustee.

LEROY INVESTMENT CO., INC.,

a corporation, and

ROSEHEDGE CORPORATION,

a corporation,

By CHARLES J. KATZ, WILLIAM

RUYMANN and SAMUEL W.

BLUM,

/s/ By CHARLES J. KATZ,

Attorneys for LeRoy Investment Co., Inc., a corporation, and Rosehedge Corporation, a corporation. [30]

[Stamped]: Received and Filed Sept. 6, 1957.
John C. Mowbray, Referee in Bankruptcy.

[Endorsed]: Filed October 19, 1957.

[Title of District Court and Causes.]

PETITION FOR REVIEW OF REFEREE'S
ORDER DATED SEPTEMBER 6, 1957 AND
PETITION FOR SUSPENSION OF EXE-
CUTION OR ENFORCEMENT OF SAID
ORDER

Alexander Bisno hereby represents:

1. That he is one of petitioners herein.
2. That he is a general partner in the Moulin Rouge, a limited partnership.
3. That petitioner Millie Sterett is a creditor of said limited partnership in the amount of \$35,000.00 secured by a chattel mortgage recorded on July 13, 1955 in Book 61, No. 51829 of official records of Clark County, Nevada, which chattel mortgage describes and lists the personal property included therein.
4. That petitioner Bernice Gurewitz is a general creditor of said limited partnership in the amount of \$7,000.00 and has filed her Proof of Claim in said matter with the above entitled Court.
5. That on September 6, 1957, the Honorable John C. [31] Mowbray, Referee in Bankruptcy, signed an order entitled as follows:

“Order

(1) Granting Motion of Leroy Investment Co., Inc., a Corporation, and Rosehedge Corporation, a Corporation, For Leave to Proceed With Sale Under Pledge Sale, etc.,

(2) Overruling and Denying the Objections of Trustee to Said Motion;

(3) Upholding the Validity of the Pledges, and the Liens Thereof, of LeRoy Investment Co., Inc. and Rosehedge Corporation;

(4) Upholding the Validity and Lien of the Pledged Property (i.e.) Promissory Note Dated July 9, 1954, and Deed of Trust of Same Date, and Recorded As Document No. 14830 on July 12, 1954, in Book 15, Official Records, of Clark County, Nevada;

(5) And Other Relief."

6. That petitioners' interest in said bankruptcy differ. That petitioners join in this Petition for Review in which petition there is no conflict and that petitioners represent to the Court that if at some later time a conflict of interest should arise between petitioners, separate counsel shall be obtained for such petitioners as might conflict with each other.

7. That petitioner alleges that the following are the grounds for review of said order and reversal thereof.

a. That the evidence is insufficient to justify said order in the following particulars.

1. The assignment, pledge, deed of trust and liens referred to in said order are not and never were valid, legal, binding, subsisting or enforceable.

2. That LeRoy Investment Company, Inc. and

Rosehedge Corporation are at most general creditors of said bankrupt.

3. That the sums set forth to be due LeRoy Investment Company, Inc. are not secured by a valid first pledge of personal property. [32]

4. That the personal property alleged to be security for said first pledge is not described in said pledge or in said order.

5. That said deed of trust in favor of LeRoy Investment Company, Inc. is not valid, subsisting, binding and enforceable. That the amount of principal allegedly due under the promissory note to Rosehedge Corporation is erroneously stated. That the amounts of said promissory note in favor of Rosehedge Corporation are not secured by a valid pledge of personal property.

6. That there was no delivery or pledge by Louis Rubin and Alexander Bisno of any personal property to LeRoy Investment Company, Inc. or Rosehedge Corporation.

7. That said Rosehedge Corporation is not the lawful pledgee and pledge holder of said \$600,000.00 promissory note and deed of trust securing the same.

8. That there are prior and superior rights in possession of the said personal property other than asserted by LeRoy Investment Company, Inc.

9. That the described promissory note dated July 9, 1954 issued by Edna Shulman is not valid,

subsisting, binding, enforceable nor supported by adequate or legal consideration.

10. That the deed of trust securing said Shulman promissory note is not valid, subsisting, binding or enforceable and that said deed of trust does not constitute a valid secured first lien upon the real property described in said order.

11. That the rights of LeRoy Investment Company, Inc. and Rosehedge Corporation are subject to other priorities including that of petitioner Millie Sterett and that said corporations are general creditors of said bankrupt.

12. That neither LeRoy Investment Company, Inc. nor Rosehedge Corporation were bona fide purchasers of said promissory notes issued by Edna Shulman. That neither of said corporations [33] took said promissory notes in good faith or for value. That both of said corporations had actual notice of the infirmities in said note or knowledge of such facts that their actions in taking such note amounted to bad faith.

b. That petitioners are informed and believe and thereupon allege that there was a compromise between the trustee in bankruptcy and LeRoy Investment Company, Inc. and Rosehedge Corporation, that this compromise was the result of prior negotiations, that said compromise was reached is evidenced by the fact that said order of 14 pages was prepared and ready for signature by the Referee in Bankruptcy on September 6, 1957, the date of the hearing set by said Referee, and that said adverse

parties waived written findings of fact and conclusions of law, waived any and all rights of review and appeal from said order and consented to the entry of said order without further notice or motion. That neither said trustee nor the attorney for said Rosehedge Corporation and LeRoy Investment Company, Inc. gave notice to any creditors of said compromise and that said compromise and order based thereon is void for failure to give due notice to creditors as required by the Bankruptcy Act.

c. That said chattel mortgage in favor of Millie Sterett is prior in claim, validity and interest to any of the liens asserted by LeRoy Investment Company, Inc. and Rosehedge Corporation.

d. That the effect of said order is to completely wipe out any and all claims of petitioner Bernice Gurewitz and any and all claims of all other general creditors, totalling in excess of \$1,000,000.00.

e. That petitioner Alexander Bisno, was the original petitioner in the voluntary petition under Chapter XI of the Bankruptcy Act on behalf of Moulin Rouge, a limited partnership, and under this erroneous order said petitioner will face a non-dischargeable [34] indebtedness and income tax lien in the amount of approximately \$200,000.00 to the Department of Internal Revenue.

f. That petitioners are informed and believe and thereupon allege that numerous creditors of the bankrupt are still negotiating with the Atomic Energy Commission in an effort to obtain a lease on the Moulin Rouge property involved in the Ref-

eree's order and if said lease is consummated in the near future, petitioners are informed and believe that it will result in payment of said income tax lien of petitioner Alexander Bisno, satisfaction of the secured indebtedness of Millie Sterett, and partial payment of the claim of petitioner Bernice Gurewitz and other general creditors.

g. That there were irregularities in proceedings of the Referee by which petitioners were prevented from having a fair trial.

h. That there was accident and surprise, which ordinary prudence could not have guarded against.

i. That there is newly discovered evidence which petitioners could not with reasonable diligence have discovered and produced at the hearing in this matter.

j. That there was error in law occurring at the hearing and excepted to by the parties injured by said order.

8. That petitioners pray that said order of September 6, 1957 be suspended and stayed pending ruling upon this Petition for Review and pending any appeals which may be taken in this matter.

9. That petitioners were unable to obtain a copy of said order until September 11, 1957 and petitioners immediately thereafter presented a copy of said order to their attorneys requesting the opinion of said attorneys as to the validity thereof. That because of the lack of sufficient time to properly examine said order and to prepare a Petition for

Review, petitioners allege that this Petition for Review may require amendment in order to fully and [35] more properly set forth petitioners' grounds for review of said order of said Referee and petitioners hereby request leave of Court in which to file an amended Petition for Review if for any reason this Petition should be defective or require amendment.

10. That petitioners request that the District Court consider upon its review all of the pleadings, papers, documents on file herein and all of the evidence, documentary and oral, and transcripts of testimony herein.

Wherefore, petitioners pray that said order of September 6, 1957 be reversed and that execution or enforcement of said order be stayed pending the ruling on this Petition for Review and pending any appeals to be taken in said matter.

/s/ ALEXANDER BISNO.

ARTHUR N. GREENBERG AND
ROBERT COHEN,

/s/ By ARTHUR N. GREENBERG,
Attorneys for Petitioners. [36]

Duly Verified.

Affidavit of Service by Mail Attached. [37]

[Stamped]: Received and Filed Sep. 17, 1957.
John C. Mowbray, Referee in Bankruptcy.

[Endorsed]: Filed October 19, 1957.

[Title of District Court and Causes.]

STIPULATION re Sale of Real Property free and clear of liens, the lien and lien rights being transferred to sale proceeds, etc. (LEROY and ROSEHEDGE)

Harry E. Miller, the Receiver and Trustee in the above entitled proceedings, hereinafter designated "Trustee", and LeRoy Investment Co., Inc., a corporation, hereinafter designated "LeRoy", and Rosehedge Corporation, a corporation, hereinafter designated "Rosehedge", by and through their respective counsel, hereby stipulate as follows:

Whereas, heretofore and during February, 1956, LeRoy and Rosehedge filed their Motion For Leave to Proceed With Sale Under Pledge Sale and Sale Under Power of Sale Contained in Deed of Trust, reference to which motion is hereby made for further particulars; and

Whereas, the Receiver, Harry E. Miller, by and through his counsel, filed a written answer with written objections to said motion upon certain specified grounds, reference to which answer and objections is hereby made for further particulars; and

Whereas, hearings have been held and conducted upon said motion, and answer and objections thereto, before the Honorable John C. Mowbray, Referee in Bankruptcy, and that said matters are now pending and undetermined; and

Whereas, the parties desire that the real property hereinafter described, being the property cov-

ered by and included within the aforementioned Edna Shulman deed of trust, be sold as expeditiously as is reasonably possible by the Trustee, at public sale, through the above entitled Court, free and clear of all liens, upon the terms and conditions hereinafter set forth:

Now, Therefore, it is hereby stipulated and agreed by and between the aforementioned parties, by and through their respective counsel as follows:

1. That pending the final determination of the aforementioned motion and objections, the real property hereinafter described may be sold by the Trustee herein, at public auction, under the supervision of, and subject to the approval or confirmation by the above entitled Court, free and clear of and from the pledge liens claimed, held, possessed, asserted and owned by LeRoy and Rosehedge, and free and clear of and from the lien imposed and created by the aforementioned Shulman deed of trust upon the real property hereinafter described, upon the following terms and conditions:

(a) That such sale shall be without prejudice to the rights, claims, liens and security, asserted, claimed, held or possessed by LeRoy and Rosehedge, and each of them, and likewise shall be without prejudice to the objections and defenses now interposed by the Receiver and or Trustee as hereinbefore mentioned; and that the Court shall hear and determine the aforementioned motion of LeRoy and Rosehedge, and the objections thereto interposed by the Receiver;

(b) That said property shall be sold by the Trus-

tee as expeditiously as is reasonably possible and said sale be confirmed by the Court not later than ninety (90) days from and after June 20, 1956, unless extended by the Court for good cause shown;

(c) That the lien and lien rights of LeRoy and Rosehedge now claimed, owned, held or asserted by them, and each of them, shall be transferred to the proceeds derived from such sale or sales by Trustee, in the amounts, order and priority, and with the same rights, benefits and privileges, as now claimed, owned, possessed, held and asserted by LeRoy and Rosehedge, and each of them; that only the actual cost of insurance premium, and the actual and necessary costs and expenses of preservation of the estate, incurred since the filing of the petition herein, including the actual and necessary costs and expenses of the sale of the real property hereinafter set forth shall be entitled to priority over, and shall be prior to the liens asserted or possessed by LeRoy and Rosehedge, and that all costs of administration, and all fees, and all other costs, charges and burdens herein shall be and are subsequent and inferior to the liens asserted or possessed by LeRoy and Rosehedge, and neither the liens asserted by LeRoy and Rosehedge, nor the funds or proceeds derived from the sale of the real property hereinafter set forth shall be burdened or charged therewith, except only such funds or proceeds as shall remain after the liens asserted by LeRoy and Rosehedge, and each of them, shall have been paid or satisfied in full, or otherwise finally determined as herein provided;

(d) That LeRoy and Rosehedge, and each of them, shall be notified in writing by Trustee, at least ten (10) days before the holding of any sale, of the time and place of each, every and all of such sales to be held of the real property hereinafter described, or any part or portion thereof, and likewise shall be notified in writing by Trustee, at least ten (10) days before the date set for any hearing of any and all petitions or applications for the confirmation, or approval, of any and all sales made or held by the Trustee, of the said real property or any part or portion thereof;

(e) That at any such sale or sales of said real property hereinafter described, or any part thereof, the said LeRoy and Rosehedge, jointly or severally may be a bidder or bidders thereat, and jointly or severally may become purchaser or purchasers at such sale or sales. In bidding at such sale or sales, LeRoy and Rosehedge, jointly or severally, may, and shall be entitled to use on account of any and all bids made by them, or either of them, the amount of their respective indebtedness as claimed by them at such time, in whole, or in part;

(f) That in the event LeRoy and Rosehedge, jointly or severally, become purchaser or purchasers at such sale or sales of the real property hereinafter described, or any part thereof, and such sale or sales are confirmed, or approved, by the above entitled Court, LeRoy and Rosehedge, and each of them, may, and shall be entitled to use and apply the amount of their respective indebtedness as claimed by them at the time of such purchase, in whole, or in part, including the principal and

interest of said indebtedness, and all sums paid out, or incurred by them, or either of them, for the protection or preservation of the said real property, and attorney fees as provided by the respective promissory notes, and as approved by this Court, as a credit upon, and as payment upon the said purchase price of the property purchased;

(g) That in the event LeRoy and Rosehedge, jointly or severally, shall be the purchaser at such sale or sales, a trustee's deed to, and possession of said real property so purchased, shall be delivered to such purchaser and such purchaser, immediately after confirmation or approval of said sale, or sales by the Court, shall be entitled to the full use, occupancy and enjoyment of said real property, so purchased, free and clear of all claims of every kind thereagainst on the part of the Trustee, excepting that the Trustee shall be entitled to receive in cash from the said LeRoy and/or Rosehedge, a sum equal to the actual insurance premiums incurred by Trustee, during administration, and a sum equal to the amount of the actual and necessary costs and expenses of preserving the estate, and the actual and necessary costs and expense of sale, as provided and specified under subdivision (c) hereof, and as determined by the Court; and excepting further that said purchaser or purchasers shall not transfer, encumber or convey said property, or any part thereof, pending the final determination of the aforesaid motions of LeRoy and Rosehedge and the objections thereto;

(h) In the event that LeRoy and Rosehedge, jointly or severally, become the purchaser of the

said real property hereinafter described, and it finally shall be determined that the aforesaid motion of LeRoy and Rosehedge shall be granted, and the validity of the liens asserted by LeRoy and Rosehedge are upheld in an amount equal to, or greater than the amount used as a credit on account of the purchase price, then the title of such purchaser shall be absolute, and the said purchaser then may dispose of, or otherwise deal with the property purchased, free and clear of all claims, right, title, interest, estate or lien of the Trustee, and this estate.

(i) In the event that LeRoy and Rosehedge, jointly or severally, become the purchaser of the said real property hereinafter described, and it finally be determined that the motion of LeRoy and Rosehedge be denied, and that the liens asserted by LeRoy and Rosehedge, and each of them, are invalid, and their respective claims and indebtedness shall be allowed only as general claims herein, then LeRoy and Rosehedge, as such purchaser, shall immediately pay that portion of the purchase price for which credit was allowed by virtue of their claims, as herein provided;

(j) In the event of any disputes between the parties hereto as to any of the amounts or sums of money referred to and provided for under the provisions of subdivision (i), as aforesaid, or in the event of any disputes of the parties over or relating to the actual and necessary costs and expenses incurred or expended for the preservation of the estate since the filing of the petition herein and

for insurance incurred or expended by either of the parties hereto or for the actual and necessary costs and expenses of sale referred to and as provided under subdivision (c) hereof, then such dispute or disputes shall be submitted to and determined by this Court, subject to the right of review and appeal by either party;

(k) In the event that neither LeRoy nor Rosehedge shall become the purchaser of the real property hereinafter described, or any part thereof, and such real property shall be sold to some other person or persons, firm or corporation, then, and in that event, the cash received as the purchase price shall be impressed with the respective liens asserted by LeRoy and Rosehedge and their respective lien rights, and such liens and lien rights shall be transferred to and impressed upon such funds in the amount, order and priority as they now claim, possess and assert. In the event the motion of LeRoy and Rosehedge be granted and the validity of the liens asserted by them be upheld by the Referee herein, that then the Trustee shall pay to LeRoy and Rosehedge, out of such funds, the amount of the liens so determined by the Referee. In the event that the Trustee takes a review and appeals from such decision, LeRoy and Rosehedge, as a condition to the receipt of such moneys, shall execute an agreement in writing, to be guaranteed by such individuals as shall be approved by the Court, which agreement and guaranty shall provide that in the event it shall be finally determined that the liens of LeRoy and Rosehedge are totally in-

valid, then LeRoy and Rosehedge shall repay to Trustee all said sums so received by them, and each of them; and in the event that said liens be finally determined to be valid in an amount less than allowed by the Referee and received by LeRoy and Rosehedge, that then LeRoy and Rosehedge shall repay to Trustee the excess of the amounts of money received by them, over the amount of the liens as finally determined.

(l) That notwithstanding anything herein contained to the contrary, the amount of liens and lien rights claimed and asserted by LeRoy and Rosehedge constitute the unpaid principal on the \$250,000.00 promissory note held by LeRoy and the unpaid principal on the \$195,000.00 promissory note held by Rosehedge, together with the unpaid interest on each of said promissory notes, as therein provided, and all sums paid out and incurred by them, or either of them, for the protection and preservation of the real property hereinafter described, and attorney fees, as provided by the aforementioned respective promissory notes, and as approved by this Court.

(m) The real property referred to herein, and affected hereby is that certain real property situate in the City of Las Vegas, County of Clark, State of Nevada, covering the premises known as 900 West Bonanza Road, Las Vegas, Clark County, Nevada, and more particularly described as follows, to-wit:

“That portion of the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section 28,

Township 20 South, Range 61 East, M.D.B. & M., described as follows:

Commencing at the Southeast corner of the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of said Section 28; thence North $2^{\circ} 50' 40''$ East a distance of 50.09 feet to a point, thence South $89^{\circ} 18' 66''$ West along the North line of Bonanza Road a distance of 363.86 feet to the true point of beginning; thence continuing South $89^{\circ} 18' 00''$ West a distance of 533.00 feet to the Southeast corner of that certain parcel of land conveyed by Edna Shulman to Alfred R. Child et ux by deed recorded January 19, 1955, as Document No. 32228, Clark County, Nevada records; thence North $1^{\circ} 24' 00''$ East, a distance of 153.49 feet to a point; thence North $43^{\circ} 36' 30''$ West a distance of 48.03 feet to a point; thence North $1^{\circ} 24' 00''$ East a distance of 146.30 feet to the Northeast corner of the said conveyed parcel; thence North $89^{\circ} 18'$ East a distance of 926.99 feet to a point; thence South $1^{\circ} 24' 00''$ West a distance of 194.78 feet more or less to a Southeast corner of that certain parcel of land conveyed by J. A. Haggard et ux to Will Max Schwartz by deed recorded April 5, 1954, as Document No. 7190, Clark County, Nevada records; thence South $89^{\circ} 18'$ West a distance of 360.00 feet to an inverted corner of the last mentioned conveyed parcel; thence South $1^{\circ} 24' 00''$ West a distance of 140.09 feet to the true point of beginning."

(n) That all of the terms, covenants and provisions of this stipulation are intended to and shall

inure to the benefit of and be binding upon the parties hereto, and their respective successors and assigns.

Dated this 19th day of June, 1956.

QUITTNER, STUTMAN &
TREISTER,
MORSE, GRAVES & COMPTON,
/s/ By FRANCIS F. QUITTNER,
Attorneys for Trustee.

CHARLES J. KATZ,
SAMUEL W. BLUM,
WILLIAM G. RUYMANN,
/s/ By SAMUEL W. BLUM,
Attorneys for LeRoy Investment Co., Inc., and
Rosehedge Corporation.

Approved, and So Ordered: June 19, 1956.

/s/ JOHN C. MOWBRAY,
Referee.

[Stamped]: Received and Filed June 19, 1956.
John C. Mowbray, Referee in Bankruptcy.

[Endorsed]: Filed October 22, 1957.

[Title of District Court and Causes.]

ORDER CONFIRMING SALE OF PROPERTY
FREE AND CLEAR OF LIENS, EXCEPT-
ING CERTAIN SPECIFIED LIENS

At Las Vegas, In Said District, On The 23rd Day
of September, 1957.

Upon the petition of the Trustee, Harry E. Mil-

ler, verified and filed on the 5th day of June, 1956, for authority to sell the real property hereinafter described, in accordance with the terms of the Bankruptcy Act, and upon due notice of hearing on said petition, under date of June 5, 1956, having been given to all of the creditors of the above named Bankrupts, attorneys, lien holders, lien claimants, and other parties in interest, as provided by law and the provisions of the Bankruptcy Act; and [38] upon the verified petition of the Trustee, Harry E. Miller, filed May 21, 1956, to sell the said real property hereinafter described, free and clear of all liens, and upon a supplemental petition thereto, filed June 5, 1956, and upon due notice of hearing on said petitions, under date of June 5, 1956, having been given to all creditors of the above Bankrupts, attorneys, lien holders, lien claimants and other parties in interest, as provided by law, and the Order of this Court, and a hearing upon and pursuant to the aforesaid notices having come on regularly before the undersigned Referee, in his Courtroom, on the 18th day of June, 1956, and further hearing upon the said notice for authority to Trustee to sell said real property hereinafter described, and the said notice of hearing thereon, then, and thereafter, having been continued by Orders of Court from time to time to September 6, 1957; and it further appearing that on the 6th day of July, 1956, an Order was duly made and filed in the above named Bankrupts' proceedings authorizing the sale of said real property hereinafter described, in accordance with the terms

of the Bankruptcy Act, and further authorizing the sale of said real property hereinafter described free and clear of all liens, and that said Order has become and now is final; and it further appearing that due notice of the sale of said real property was widely and extensively advertised, both locally and nationally throughout the United States of America in well-known and widely circulated newspapers of general circulation, including the following newspapers: the Wall Street Journal, in the San Francisco edition, the Los Angeles edition and the New York edition thereof, the Los Angeles Times, the San Francisco Chronicle, the St. Louis Post-Dispatch, the Dallas News, the Fort Worth Star Telegram, the Louisville Courier Journal, the Cleveland Plain Dealer, the Detroit Free Press, the Chicago Tribune, the Las Vegas Sun, the Review Journal of [39] Las Vegas, and the Henderson and Boulder City News, on numerous occasions and for extended periods of time, and by brochures caused to be prepared, and printed, by the Trustee and sent by said Trustee throughout the entire United States of America to many thousands of prospective bidders, prospective purchasers and other persons interested in bidding upon or purchasing said real property hereinafter described; and that due notice of sale of said real property has been given to the general public and to all of the creditors of the above named Bankrupts, attorneys, lien holders, lien claimants, and to all parties in interest, in the form and manner and for such time as required by law and the Bankruptcy Act; and that

said sale, and notice thereof, was continued by Orders of Court, and by public announcement, from time to time to September 6, 1957, to enable the Trustee to obtain the highest and best bid and offer available for said property; and it further appearing that at said hearing on September 6, 1957, the said real property hereinafter described and certain personal property was offered for sale, at public auction, by the undersigned Referee, in his Courtroom, and that at said time an offer was made in open Court by S. Kohn to purchase the real property hereinafter described, together with the improvements, free and clear of all taxes, liens and encumbrances except as hereinafter specifically set forth, for the sum of \$116,000.00 cash, and that for the same consideration and as a part of the same transaction there was to be conveyed and transferred to the said purchaser, if the successful bidder, by bill of sale, all of the right, title, interest and estate of the Trustee herein in and to all of the furniture, furnishings, gaming equipment of all kinds, and all other tangible personal property pertaining to the business of the Moulin Rouge, but subject, however, to all valid and subsisting conditional sales contracts and chattel mortgages against the said personal property; and that said offer [40] further provided that the proposed sale was to be consummated through an escrow to be opened upon the acceptance of the said bid by the Court; that the purchase price was to be paid through said escrow; that the aforesaid purchaser, if the successful bidder, shall obtain a policy of

title insurance guaranteeing the title to the hereinafter described real property to be free and clear, except as hereinafter specifically provided; that as a part of and in connection with said offer, the said bidder further agreed to pay all of the costs of the escrow, including the sewer assessment, the costs of the title policy to be procured, and to pro rate the insurance and utilities; and that the real property referred to and covered by the said bid are those certain premises located in the County of Clark, State of Nevada, and hereinafter more particularly described; and the Court having heard and received other bids by and on behalf of other bidders; and it further appearing that the aforesaid bid of S. Kohn was the highest and best bid made at said sale and the highest and best bid which could and can be obtained for said property; and after hearing the attorneys for the Trustee, and the attorneys for the aforesaid bidder, in support of the said bid, and the Chairman of the Creditors' Committee, and the attorney for another bidder, and other parties present at the time of said sale, in connection with the said offers and said sale, the Court then accepted the bid of S. Kohn, as made, and upon all of the evidence, and it further appearing that said sale was and is in all respects regular and in accordance with the Orders of the Court and the provisions of the Bankruptcy Act, and that the said sale is in the best interests of the above Bankrupt estates; and after hearing the attorney for the Trustee in support of an Order for confirmation of said sale as aforesaid, and no opposition appearing thereto; [41]

Now, Therefore, Good Cause Appearing, It Is Ordered, that the sale of all of that certain parcel of real property hereinafter described, together with the improvements thereon, free and clear of all taxes, liens and encumbrances, except only the following:

(1) State, County and City Taxes for the period January 1, 1955 through June 30, 1955, and to date now due and payable, or owing though not now payable.

(2) Assessment No. 100-36 for street improvement in the City of Las Vegas; the amount and method of payment of this assessment is unknown at this time.

(3) A trust deed to Pioneer Title Insurance and Trust Company, a corporation, Trustee, executed by Edna Shulman, a single woman, to secure her note in the sum of \$600,000.00, which note is referred to, but not set out, in favor of Bisno & Bisno, Inc., a Nevada Corporation, and to secure such other sums as may become due under the terms of said trust deed, dated July 9, 1954 and recorded July 12, 1954, as Document No. 14830, in Book No. 15 of Official Records, in the Office of the County Recorder of Clark County, Nevada, said Trust Deed is referred to in the Stipulation dated June 19, 1956 between the Trustee herein and LeRoy Investment Co., Inc. and Rosehedge Corporation, and the terms of said Stipulation shall govern the right of the parties thereto.

(4) By instrument dated April 14, 1955 and recorded April 29, 1955, as Document No. 45179, in Book No. 53 of Official Records, in the Office of the County Recorder of Clark County, Nevada, the hereinabove described Trust Deed was assigned by Bisno & Bisno, Inc. to Alexander Bisno and Louis Rubin. [42]

(5) By instrument dated April 18, 1955 and recorded April 29, 1955, as Document No. 45180, in Book 53 of Official Records, in the Office of the County Recorder of Clark County, Nevada, the hereinabove described Trust Deed was assigned by Louis Rubin and Alexander Bisno to LeRoy Investment Co., Inc., a California corporation, given as collateral security for the payment of a certain promissory note executed and delivered by the assignor to the Assignee to secure the payment of the principal sum of \$250,000.00 and interest. Reference to said instrument is made for full particulars.

(6) By instrument dated May 24, 1955 and recorded May 25, 1955, as Document No. 47538, in Book No. 56 of Official Records, in the Office of the County Recorder of Clark County, Nevada, the hereinabove described Trust Deed was assigned by Louis Rubin and Alexander Bisno to Rosehedge Corporation, given as collateral security for the payment of a certain note executed and delivered by the Assignor to the Assignee to secure the payment of the principal sum of \$195,000.00, and interest; reference to said instrument is made for full particulars;

together with the furniture, furnishings, gaming equipment of all kinds, and all other tangible personal property pertaining to the business of the Moulin Rouge, subject however, to all valid and subsisting conditional sales contracts and chattel mortgages against the said personal property, so made in open Court to S. Kohn, for the sum of \$116,000.00 cash, be and the same hereby is approved and confirmed, and Harry E. Miller, the Trustee of the above named Bankrupt estates, is hereby directed to execute and deliver to the said S. Kohn, or her nominee, a good and sufficient [43] instrument of title to the said real property hereinafter described, and a bill of sale of all of the right, title, interest and estate of the said Trustee in and to the aforesaid personal property, subject to all valid and subsisting conditional sales contracts and chattel mortgages against the said personal property, upon the payment of the said purchase price.

The said real property so sold, and referred to herein and affected hereby, is located in the County of Clark, State of Nevada, and more particularly described as follows:

That portion of the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section 28, Township 20 South, Range 61 East, M.D.B. & M., described as follows:

Commencing at the Southeast corner of the Northeast Quarter (NE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section 28; thence North $2^{\circ} 50' 40''$ East a distance of 50.09 feet to a point; thence

South 89° 18' 00" West along the North line of Bonanza Road a distance of 363.86 feet to the true point of beginning; thence continuing South 89° 18' 00" West a distance of 533.00 feet to the Southeast corner of that certain parcel of land conveyed by Edna Shulman to Alfred R. Child et ux by deed recorded January 19, 1955, as Document No.32228, Clark County, Nevada records; thence North 1° 24' 00" East a distance of 153.49 feet to a point; thence North 43° 36' 30" West a distance of 48.03 feet to a point; thence North 1° 24' 00" East a distance of 146.30 feet to the Northeast corner of said conveyed parcel; thence [44] North 89° 18' East a distance of 926.99 feet to a point; thence South 1° 24' 00" West a distance of 194.78 feet more or less to a Southeast corner of that certain parcel of land conveyed by J. A. Haggard et ux to Will Max Schwartz by deed recorded April 5, 1954, as Document No. 7190, Clark County, Nevada records; thence South 89° 18' West a distance of 360.00 feet to an inverted corner of the last mentioned conveyed parcel; thence South 1° 24' 00" West a distance of 140.09 feet to the true point of beginning.

/s/ JOHN C. MOWBRAY,
Referee in Bankruptcy.

Approved as to form and contents:

MORSE, GRAVES & COMPTON
and QUITTNER, STUTMAN &
TREISTER,

/s/ By FRANCIS F. QUITTNER,
Attorneys for Trustee.

WILLIAM G. RUYMANN,
CHARLES J. KATZ,
SAMUEL W. BLUM and
ROBERT J. MAGDLEN,

/s/ By CHARLES J. KATZ,
Attorneys for S. Kohn,
Purchaser. [45]

[Stamped]: Received and Filed Sept. 23, 1957.
John C. Mowbray, Referee in Bankruptcy.

[Endorsed]: Filed October 22, 1957.

[Title of District Court and Causes.]

PETITION FOR REVIEW OF REFEREE'S
ORDER CONFIRMING SALE OF PROP-
ERTY FREE AND CLEAR OF LIENS,
EXCEPTING CERTAIN SPECIFIED
LIENS DATED SEPTEMBER 23, 1957

Alexander Bisno hereby represents:

1. That he is one of petitioners herein.
2. That he is a general partner in the Moulin Rouge, a limited partnership.
3. That petitioner Millie Sterett is a creditor of said limited partnership in the amount of \$35,000.00 secured by a chattel mortgage recorded on July 13, 1955 in Book 61, No. 51829 of official records of Clark County, Nevada, which chattel mortgage describes and lists the personal property included therein.

4. That petitioner Bernice Gurewitz is a general creditor of said limited partnership in the amount of \$7,000.00 and has filed [46] her Proof of Claim.

5. That on September 23, 1957, the Honorable John C. Mowbray, Referee in Bankruptcy, signed an order entitled as follows:

“Order Confirming Sale of Property Free and Clear of Liens, Excepting Certain Specified Liens.”

6. That petitioners' interest in said bankruptcy differ. That petitioners join in this Petition for Review in which petition there is no conflict and that petitioners represent to the Court that if at some later time a conflict of interest should arise between petitioners, separate counsel shall be obtained for such petitioners as might conflict with each other.

7. That petitioners allege that the following are the grounds for review of said Order and are grounds for reversal thereof:

a. On or about July 6, 1956, the above entitled Court by the Honorable John C. Mowbray in the above entitled proceedings authorized the sale of the real property described in said order free and clear of all liens. That the offer made by said S. Kohn to purchase said real property was not in accordance with said Order of July 6, 1956, in that said offer was not made free and clear of all liens and was made expressly subject to a trust deed in the amount of \$600,000.00 to Pioneer Title Insurance & Trust Company, a corporation trustee, made by

Edna Shulman, a single woman, to secure her note in said amount in favor of Bisno & Bisno, Inc. and the assignments thereof to LeRoy Investment Company, Inc. and Rosehedge Corporation. That by virtue of said exceptions, said sale to S. Kohn was not made in accordance with said Order of July 6, 1956 in that said sale was not free and clear of all liens. That notice as required in the Bankruptcy Act was not given with reference to said sale to S. Kohn, which was made contrary to said Order of July 6, 1956.

b. That the evidence is not sufficient to justify [47] said order in the following particulars:

1. Said promissory note and trust deed assigned in favor of LeRoy Investment Company, Inc. and Rosehedge Corporation were not and never were valid, subsisting, binding or enforceable and that said corporations are not the lawful holders, owners, pledgees or pledge holders of said promissory note and deed of trust.

2. That there are prior and superior rights than those asserted by said corporations.

3. That the promissory note dated July 9, 1954, issued by Edna Shulman is not valid, subsisting, binding, enforceable or supported by adequate or legal consideration.

4. That neither of said corporations were bona fide purchasers of said promissory note issued by Edna Shulman.

5. That neither of said corporations took said promissory note in good faith or for value.

6. That both of said corporations had actual notice of the infirmities in said note or knowledge of such facts that their actions in taking such note amounted to bad faith.

c. That the Order of September 6, 1957, provides on Page 12 thereof that if the property is sold, then the liens and the claims of LeRoy Investment Company, Inc. and Rosehedge Corporation shall be transferred to the net proceeds of said sale and said corporations shall be paid in full the amounts as determined in the Order of September 6, 1957; however, the Order further provides that if the property is not sold by the Court within days hereof, then LeRoy Investment Company, Inc. and Rosehedge Corporation are authorized to proceed with the sale of said property in accordance with the power of sale contained in the alleged deeds of trust and pledge agreement. That, however, an offer was received and filed by the Referee on September 6, 1957, by S. Kohn for the purchase of the real property, subject to the trust deeds which are the subject [48] matter of the Order of September 6, 1957, and contrary to the Order of the Referee dated July 6, 1956, and the Stipulation of June 19, 1956, as well as the Order of September 6, 1957, and said offer of S. Kohn was accepted by the Referee on September 6, 1957, without prior notice of said sale being given to creditors or parties interested in this proceeding.

d. That petitioners are informed and believe and thereupon allege that there was a compromise between the trustee in bankruptcy and LeRoy Investment Company, Inc. and Rosehedge Corporation, that this compromise was the result of prior negotiations, that said compromise was reached is evidenced by the fact that the Order of September 6, 1957 of 14 pages was prepared and ready for signature by the Referee in Bankruptcy on September 6, 1957, the date of the hearing set by said Referee, and that said adverse parties waived written findings of fact and conclusions of law, waived any and all rights of review and appeal from said Order and consented to the entry of said Order without further notice of motion. That neither said trustee nor the attorney for said Rosehedge Corporation and LeRoy Investment Company, Inc. gave notice of any creditors of said compromise and that said compromise and order based thereon is void for failure to give due notice to creditors as required by the Bankruptcy Act.

e. That there were irregularities in proceedings of the Referee by which petitioners were prevented from having a fair trial.

f. That there was accident and surprise, which ordinary prudence could not have guarded against.

g. That there is newly discovered evidence which petitioners could not with reasonable diligence have discovered and produced at the hearing in this matter.

h. That there was error in law occurring at the

hearing and excepted to by the parties injured by said Order. [49]

i. That petitioners incorporate by reference their Petition for Review of the Referee's Order of September 6, 1957.

8. That petitioners pray that said Order of September 23, 1957 be suspended and stayed pending ruling upon this Petition for Review and pending any appeals which may be taken in this matter.

9. That petitioners were unable to obtain a copy of said Order until September 28, 1957 and petitioners immediately thereafter presented a copy of said order to their attorneys requesting the opinion of said attorneys as to the validity thereof. That because of the lack of sufficient time to properly examine said order and to prepare a Petition for Review, petitioners allege that this Petition for Review may require amendment in order to fully and more properly set forth petitioners' grounds for review of said Order of said Referee and petitioners hereby request leave of Court in which to file an amended Petition for Review if for any reason this Petition should be defective or require amendment.

10. That petitioners request that the District Court consider upon its review all of the pleadings, papers, documents on file herein and all of the evidence, documentary and oral, and transcripts of testimony herein.

Wherefore, petitioners pray that said Order of

September 23, 1957 be reversed and that execution or enforcement of said Order be stayed pending the ruling on this Petition for Review and pending any appeals to be taken in said matter.

/s/ ALEXANDER BISNO.

ARTHUR N. GREENBERG and
ROBERT COHEN,

/s/ By ARTHUR N. GREENBERG,
Attorneys for Petitioners. [50]

Duly Verified.

Affidavit of Service by Mail Attached. [51]

[Stamped]: Received and Filed Oct. 3, 1957.
John C. Mowbray, Referee in Bankruptcy.

[Endorsed]: Filed October 22, 1957.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITIONS
FILED BY ALEXANDER BISNO (AND
ALEXANDER BISNO ON BEHALF OF
MILLIE STERETT AND BERNICE GURE-
WITZ) AND BY LAWRENCE HAW-
THORNE AND BY JACK SILVERMAN
FOR REVIEW OF REFEREE'S ORDER
DATED SEPTEMBER 6, 1957

To the Honorable John R. Ross, Judge of the
Above-Entitled Court:

I, John C. Mowbray, a Referee in Bankruptcy of

said Court, before whom the above-entitled matters are pending, do hereby certify to the following:

1. Alexander Bisno, one of the general partners of the bankrupt partnership, Moulin Rouge, acting for himself, (and, according to his petition for review, acting on behalf of two others—Millie Sterrett and Bernice Gurewitz—who have not, however, signed any petition for review) has filed [52] a petition for the review of an order made and entered by the Referee on September 6, 1957; * * * * *

The Order from which said Reviews have been taken provides, among other things:

“(1) Granting Motion of LeRoy Investment Co., Inc., a Corporation, and Rosehedge Corporation, a Corporation, For Leave to Proceed With Sale Under Pledge Sale, etc.,

“(2) Overruling and Denying the Objections of Trustee to Said Motion:

“(3) Upholding the Validity of the Pledges, and the Liens Thereof, of LeRoy Investment Co., Inc. and Rosehedge Corporation;

“(4) Upholding the Validity and Lien of the Pledged Property (i.e.) Promissory Note Dated July 9, 1954, and Deed of Trust of Same Date, and Recorded as Document No. 14830 on July 12, 1954, in Book 15, Official Records, of Clark County, Nevada.” [53]

* * * * *

2. Millie Sterrett:—The Petition for Review states that Millie Sterrett is a secured creditor hold-

ing a chattel mortgage which describes and lists certain personal property. The Order of September 6, 1957, neither affects, nor relates, to her chattel mortgage claim, if any she has, nor does it relate to, affect, or include any of the described and listed chattel mortgage property. Millie Sterrett has filed no claim in these bankruptcy proceedings, either for any asserted deficiency, or as an unsecured creditor.

The time for filing claims had expired long prior to September 6, 1957; and, the Order of September 23, 1957, confirming sale of real property, and of certain personal property, expressly protects any alleged rights which Millie Sterrett asserts; for it is provided on the face of that Order that the sale of personal property to Rosehedge and LeRoy was expressly "subject, however, to all valid and subsisting conditional sales contracts and chattel mortgages against said personal property." Thus, if, in fact, Millie Sterrett does have a valid and subsisting chattel mortgage, nothing in that Order prejudices her right to pursue such remedy as she may have. Again, she is not [75] affected by the Order to sell free and clear of liens entered herein on the 6th day of July, 1956, for that order affected the real property only, and not the personal property.

Millie Sterrett has sought no relief, either by way of leave to foreclose her chattel mortgage, or petition in reclamation, in these bankruptcy proceedings. Instead, without filing any objections of any kind, and without seeking to participate in the

hearing giving rise to this Review, she, for the first time, has interjected herself into these proceedings by Petition for Review. No showing has been made that Alexander Bisno has any authority to file said Petition for, or on her behalf. The Referee is of the opinion that she is not a "person aggrieved" within the meaning of Section 39(c) of the present Bankruptcy Act. [76]

* * * * *

(c) That Roschedge Corporation, a corporation, is now the actual and lawful owner and holder of a certain promissory note, dated May 24, 1955, and executed by Moulin Rouge, a Partnership, by Louis Rubin and Alexander Bisno, individually, in the principal sum of \$195,000.00 and bearing interest at the rate of 6% per annum; principal and interest [87] payable in installments of \$7,500.00, or more, on Wednesday of each week, commencing June 1, 1955, and continuing until the full amount of principal and interest has been paid; that there is now due, owing and unpaid to Roschedge Corporation, a corporation, upon the aforesaid promissory note the following sums:

For the amount of principal on said note—
\$126,928.66.

For interest on said note at the rate of 6% per annum from August 27, 1955, to date hereof—
\$15,442.99.

For attorney fees for attorneys for Roschedge Corporation, a corporation, which is hereby allowed by the Court in the sum of—\$8,890.00.

For Rosehedge Corporation's costs and expenses laid out, incurred and expended by it for the preservation or protection of the real property and for costs and disbursements incurred herein, which is hereby allowed by the Court in the sum of—\$3,585.00.

Making in all a total sum of—\$154,846.65.

and that the aforesaid total sum shall bear interest at the rate of 6% per annum from date hereof until paid.

That the aforesaid sums are, and each of them is, secured by a valid pledge of certain personal property, hereinafter described, pledged and delivered by Louis Rubin and Alexander Bisno, the then owners and holders of said personal property, to Rosehedge Corporation, a corporation, subject to the prior pledge of LeRoy Investment Co., Inc., as hereinbefore set forth, to secure, and as security for, the payment of the aforementioned promissory note; and all sums payable thereunder, and under the certain assignment and pledge agreement executed by Alexander Bisno and Louis Rubin, the owners and holders of the personal property hereinafter described, and duly recorded on the 25th day of May, 1955, as Document No. 47538 in Book No. 56 of Official Records in [88] the Office of the County Recorder of Clark County, Nevada; that at said time of the creation of the aforesaid pledge the said pledged personal property was then in the possession of LeRoy Investment Co., Inc., a corporation, as pledgeholder under its pledge, as herein-

before set forth, and no further, or other delivery of possession of the said pledged personal property was required to create a valid pledge in favor of Rosehedge Corporation, a corporation, as aforesaid, and that immediately following the pledge to Rosehedge Corporation, a corporation, written notice of said pledge was given to LeRoy Investment Co., Inc., a corporation, by Rosehedge Corporation, a corporation: that the aforesaid pledge to Rosehedge Corporation, a corporation, is a valid, subsisting and enforceable pledge, and constitutes a valid and enforceable pledge of, and a lien upon, said personal property hereinafter mentioned, which pledge and lien is subject and junior only to the pledge given to LeRoy Investment Co., Inc., a corporation, as hereinbefore mentioned and set forth in the preceding paragraph (b) hereof.

That said pledged personal property consists of the following personal property, to wit: (i) That certain promissory note, dated July 9, 1954, executed by Edna Shulman, as maker, and payable to Bisno & Bisno, Inc., or order, in the principal sum of \$600,000.00, with interest at the rate of 6% per annum, from December 1, 1954, on unpaid principal, payable monthly; and principal payable in installments of \$10,000.00, or more, on the 1st day of each consecutive month, commencing on the 1st day of June, 1956, and continuing until said principal and interest have been paid; and (ii) that certain deed of trust, dated July 9, 1954, and executed by Edna Shulman, a single woman, as Trustor, to the Pioneer Title Insurance and Trust

Company, a California corporation, [89] and qualified to do business in the State of Nevada, as Trustee, and to Bisno & Bisno, Inc., a Nevada corporation, Beneficiary, recorded as Document No. 14830 on July 12, 1954, in Book No. 15 of the Official Records in the Office of the County Recorder, Clark County, Nevada, and covering the real property described in said Order. That the said Rosehedge Corporation, a corporation, is the lawful pledgee and pledgeholder of the said \$600,000.00 promissory note and deed of trust securing the same, subject only to the prior and superior rights and possession of the same by LeRoy Investment Co., Inc., a corporation, as pledgee, as hereinbefore set forth. That the possession of LeRoy Investment Co., Inc., a corporation, as pledgee, of the aforesaid promissory note and deed of trust also constitutes the possession of the said promissory note and deed of trust for and on behalf of Rosehedge Corporation, a corporation, as subsequent pledgee of the said promissory note and deed of trust, subject and subordinate only to the prior pledge, rights and possession of LeRoy Investment Co., Inc., a corporation, as hereinbefore set forth. That the said pledge to Rosehedge Corporation, a corporation, and the lien thereof, and each of them, is valid, subsisting and binding upon and enforceable against the Receiver and Trustee herein, and the above-entitled bankrupt estates.

(d) That the aforementioned promissory note, dated July 9, 1954, and executed by Edna Shulman, as maker, to Bisno & Bisno, Inc., or order, is a

valid, subsisting, binding and enforceable promissory note, supported by adequate and legal consideration, and without any infirmities or defenses thereto, and is binding upon and enforceable against the Receiver and Trustee herein, and the above-entitled bankrupt estates; that the entire amount of principal [90] of said promissory note, and the interest thereon, in accordance with the terms and tenor of said promissory note, are now due, owing and unpaid; that the said promissory note is secured by that certain deed of trust, executed by Edna Shulman, a single woman, as Trustor, to Pioneer Title Insurance and Trust Company, a California corporation, qualified to do business in the State of Nevada, as Trustee, and to Bisno & Bisno, Inc., a Nevada corporation, as Beneficiary, and covering the real property described in said Order, and was recorded on July 12, 1954, as Document No. 14830, in Book No. 15 of Official Records, in the office of the County Recorder of Clark County, Nevada; that said deed of trust is a valid, subsisting, binding and enforceable deed of trust, and said deed of trust, and the lien thereof, are, and each is, binding upon and enforceable against the Receiver-Trustee herein, the above-entitled bankrupt estates, and the real property described in said Order; that said deed of trust created, and creates, and now constitutes a valid, subsisting and enforceable first lien upon the said real property described in said Order, and said real property is subject to and charged and burdened with said first lien and the aforesaid deed of trust, in the amounts,

and in accordance with the terms and tenor of the
aforementioned promissory note of \$600,000.00 and
the terms and provisions of the said deed of
trust. [91]

* * * * *

Dated: October 18, 1957.

/s/ JOHN C. MOWBRAY,

Referee in Bankruptcy. [103]

[Endorsed]: Filed October 19, 1957.

[Title of District Court and Causes.]

REFEREE'S CERTIFICATE ON PETITIONS
FILED BY ALEXANDER BISNO (AND
ALEXANDER BISNO ON BEHALF OF
MILLIE STERRETT AND BERNICE
GUREWITZ) AND BY JACK SILVER-
MAN FOR REVIEW OF REFEREE'S
ORDER DATED SEPTEMBER 23, 1957

To the Honorable John R. Ross, Judge of the
Above Entitled Court.

I, John C. Mowbray, a Referee in Bankruptcy of
said Court, before whom the above entitled matters
are pending, do hereby certify to the following:

1. Alexander Bisno, one of the general partners
of the bankrupt [104] partnership Moulin Rouge,
acting for himself, (and, according to his petition
for review, acting on behalf of two others—Millie
Sterrett and Bernice Gurewitz—who have not, how-
ever, signed any petition for review,) has filed a

petition for the review of an Order made and entered by the Referee on September 23, 1957; * * * * *

The Order from which said Reviews have been taken provides among other things:

(1) Confirmed and approved the sale of certain real property (therein described), with the improvements thereon, free and clear of all taxes, liens and encumbrances, excepting certain specified taxes and liens, and the sale of certain personal property (therein designated), subject to all valid and subsisting conditional sales contracts, and chattel mortgages against said personal property, made in open Court, at public sale, before the Referee on September 6, 1957, for the sum of \$116,-000.00, cash, to one S. Kohn, and directed the Trustee to execute and deliver to S. Kohn, or her nominee, a good and sufficient instrument of title to the real property, and a bill of sale of all of Trustee's right, title, interest and estate in and to said personal property, subject to all valid, subsisting conditional sales contracts, and chattel mortgages against said personal property, upon the payment of said purchase price. Said sale was to be consummated through an escrow; the bidder was to obtain a policy of title insurance guaranteeing the title to the real property to be free and clear, except as to certain specified liens and taxes; that additionally S. Kohn was to pay the costs of escrow, the sewer assessment, the costs of policy of title insurance, and insurance and utilities were to be pro-rated.

Following the sale, such escrow was opened, and

is now [105] pending at the Pioneer Title and Insurance Trust Company, Las Vegas, Nevada.

* * * * *

The aforementioned Petitioners for Review, among others, also are Petitioners for Review from the Referee's Order of September 6, 1957.

Many of the specifications in the present Petition for Review of Mr. Bisno, et al., are identical with, or are repeated from their Petition for Review from the September 6, 1957 Order, or refers to the same subject matter. The present Bisno, et al., Petition for Review (page 5, lines 2-3) has incorporated, by reference, their Petition for Review from the Referee's Order of September 6, 1957.

The Referee, therefore, incorporates by reference, Referee's Certificate on Petitions for Review of Referee's Order, dated September 6, 1957, prepared and filed on October 19, 1957, in connection therewith, and makes the same a part hereof as though set forth herein in full. [106] * * * * *

The Proceedings

These cases commenced on October 19, 1955, with the filing of proceedings by Debtors under Chapter XI of the Acts of Congress relating to Bankruptcy. On October 19, 1955, this District Court, on the application of Alexander Bisno on behalf of Debtors, issued an Order to Show Cause requiring Rosehedge Corporation (hereinafter called "Rosehedge") and LeRoy Investment Co., Inc., (hereinafter called "LeRoy") to show cause before the

undersigned Referee why they should not be enjoined from proceeding with their then pending foreclosure of their pledges of certain personal properties, hereinafter more particularly set forth; thereafter, this Referee made an Order on October 27, 1955 staying said foreclosure proceedings pending hearing and further Order herein. Harry E. Miller was appointed Receiver herein, and subsequently, was elected Trustee in each of the above proceedings. On January 17, 1956, LeRoy and Rosehedge filed a written Motion for Leave to Proceed with Sale under Pledge Sale and Sale Under Power of Sale contained in Deed of Trust. Thereafter, Receiver filed his written objections thereto, and the matter was noticed and set for hearing on March 12, 1956. Said Motion and Objections were heard before the Referee on March 12, 13, April 5, 27, 28, 29, May 1, 24 and June 13 and 14, all in 1956, and then were submitted by the Referee for determination and decision. On September 6, 1957, the Referee made his Order herein, granting the motion; upholding the validity of the pledges of LeRoy and Rosehedge, and denying the objections of the Trustee. The proceedings had, and the evidence introduced in connection therewith are summarized and set forth in Referee's Certificate on Review from the September 6, 1957 Order, and by reference are made a part of this Certificate.

From October 19, 1955 until September 6, 1957, a period of approximately two full years, the aforesaid stay Order remained in full force and effect;

neither Rosehedge, nor LeRoy were permitted [107] to proceed with their foreclosures. During that period, the debtors (and subsequently the Bankrupts) presented no feasible plan of arrangement; on March 12, 1956, the debtors in open Court, were unable to present any feasible plan of arrangement, and consented to an adjudication in bankruptcy (See Tr. March 12, 1956—pp. 484, 490). Moulin Rouge, Inc., a corporation, was adjudged a bankrupt on March 15, 1956, and Moulin Rouge, a limited partnership, was adjudged a bankrupt on April 5, 1956. After adjudication, no plan of arrangement was ever presented to the Referee, although, on several occasions, various interested parties informed the Referee that a plan would be presented. The Referee extended invitations for any feasible plan, but none was submitted. It appeared, according to the debtors, that liabilities exceeding \$2,100,000.00 to both secured and unsecured creditors, and to tax and other claimants were outstanding. From October 19, 1955 until September 6, 1957, the aforesaid stay of foreclosure was continued in effect against Rosehedge and LeRoy, at the urgent request of some of the Petitioners for Review herein—among others—in the hope that in the interim a sale of debtors' property might be obtained, which would produce something for general creditors. While that hope remained, and out of deference to the position of creditors, and over objection of Rosehedge and LeRoy, the Referee continued the Stay Order, and the Receiver retained possession of the Moulin Rouge Hotel.

In the same intervening period of some two years, necessary expenses of administration, the costs of preservation of assets, and accruing tax liabilities were incurred and arose in an amount in excess of \$122,000.00. However, no sale or lease to any third party could be obtained during that period of time, although the said Receiver (now Trustee) advertised the property for sale in newspapers throughout the country, and solicited bids by brochures sent far and wide to possibly interested [108] parties, and actively solicited a sale or lease.

It is undisputed that the Bankrupts are hopelessly insolvent. Liabilities exceed \$2,000,000.00. The principal asset, the Moulin Rouge Hotel, while constantly offered for sale, or lease, over the period of some twenty-three months, attracted no bidder willing to pay a price that would yield anything to unsecured creditors.

From June 18, 1956, when Trustee's Petition to Sell the Property Free and Clear of Liens was first heard by the Referee until September 6, 1957, when said real property was finally sold, the Referee continued said hearings, and the sale of said real property, from time to time, in the hope that a more advantageous sale could be had, or a feasible plan of arrangement could be presented, which would give something to general unsecured creditors.

The Order of September 23, 1957 has not been reviewed by the Trustee, or by the Creditors Committee acting for unsecured creditors, or by either of the Bankrupts, or by the attorney of record for

the Bankrupts, or by the Citizens Building Committee which worked for months to find a satisfactory buyer or lessee, or by any bidder of said property. Petitioners for Review, herein, neither appeared at the sale, nor made any bid thereat, nor filed or made any objections to the sale at any time prior to the signing of the Order Confirming Sale. Seventeen days intervened between the date of sale, and the signing of the Order Confirming Sale.

The Specific Order Complained of, and the Proceedings In Respect Thereto

The issues before the Referee upon the aforesaid Motion of LeRoy and Rosehedge, and Receiver's (Now Trustee's) Objections [109] involved the validity of the pledges of LeRoy and Rosehedge, and the validity of the pledged property, consisting of a certain promissory note, dated July 9, 1954, executed by Edna Shulman, as maker, to Bisno & Bisno, Inc., or order, in the principal sum of \$600,000.00, with interest at 6% per annum from December 1, 1954; principal payable in installments of \$10,000.00, or more, on the first day of each month commencing June 1, 1955, until paid, and a certain deed of trust, securing said note, dated July 9, 1954, executed by Edna Shulman, as Trustor, to Pioneer Title Insurance & Trust Company, a California corporation, qualified to do business in Nevada, as Trustee, and to Bisno & Bisno, Inc., a Nevada corporation, as Beneficiary, and recorded on July 12, 1954, in the Office of the County

Recorder of Clark County, Nevada, and whether a valid lien was created upon the real property therein described.

This real property, and the improvements thereon (Moulin Rouge Hotel) was the principal asset of the debtors. At the beginning of Chapter XI proceedings, Harry E. Miller had been appointed Receiver of the Debtor's assets, (including the closed Moulin Rouge Hotel) for the preservation of such assets pending the formulation and adoption of a feasible plan of arrangement. The Receiver employed guards on the premises; procured insurance to cover the improvements and the contents thereof; and incurred various other necessary obligations and expenses in the preservation of the estate. Real estate taxes could not be paid and rapidly mounted. Such taxes, and costs and expenses of preservation were being incurred at the rate of approximately \$6,000.00 each month, and Receiver (now Trustee) was without funds to meet the same. Guards' salaries could not be met; insurance policies were cancelled because premiums remained unpaid, and LeRoy and Rosehedge, on occasions, did obtain the necessary insurance, until the Receiver either could re-instate the old, or obtain new insurance. Receiver was required to [110] advance, or borrow funds to meet his most pressing obligations. From October 19, 1955, several plans of arrangement were contemplated, yet no feasible, or realistic, plan was ever presented to the Referee, or to the creditors.

In fact, on March 12, 1956, the debtors, in open

Court, conceded that they could present no feasible plan of arrangement, and consented to an adjudication in bankruptcy. Such adjudications were made March 15, 1956, for the debtor-corporation, and on April 5, 1956, for the debtor partnership. The rapidly mounting unpaid obligations and expenses of Receiver (Trustee), the failure to present any feasible plans of arrangement, and the lengthy hearings on the LeRoy and Rosehedge Motion, and the objections thereto, created pressing problems.

With no feasible plan of arrangement available, the only solution appeared to be an immediate sale of the Bankrupts' property—this even before the completion and determination of the LeRoy and Rosehedge Motion, and objections thereto. But, this also presented problems.

The rights, claims and lien asserted by LeRoy and Rosehedge upon, and in connection with, the said real property had to be considered, and provisions made therefor, in the event of any sale, pending the completion and determination of their Motion, and objections thereto, especially since LeRoy and Rosehedge had informed the Referee and Trustee that they desired to bid at any sale held, and to utilize the value of their lien claims upon such bids, and in payment of the purchase price, if they were the successful bidders. This, LeRoy and Rosehedge had the right to do, if validity of their pledges, and liens was upheld (8 Remington on Bankruptcy—Henderson, p. 113, paragraph 2594.) [111]

On May 21, 1956, Harry E. Miller, Trustee, filed

a Petition herein, praying that the Trustee be authorized to sell, free and clear of liens, the property belonging to said estate. On June 5, 1956, the said Trustee filed a Supplemental Petition thereto. Likewise, on June 5, 1956, the Trustee filed a Petition herein praying that the Trustee be authorized to sell, in accordance with the terms of the Bankruptcy Act, the property belonging to said estates. All of said petitions were set for hearing on June 18, 1956, at 10:00 o'clock A.M. in the Courtroom of the Referee, United States Post Office and Courthouse Building, Las Vegas, Nevada. This was the same time and place which previously had been noticed and announced for the Continued First Meeting of Creditors, in each of the above Bankruptcy Proceedings. All said Petitions are annexed to this Certificate.

On June 5, 1956, Notice of Hearing on Petition to Sell Real Property was signed and filed herein, which set the time and place of the hearing upon said Petition, as aforesaid. Notice of hearing on such Petition was duly given by mailing copies of said Notice to all creditors of the above-named Bankrupts, attorneys, lien holders, lien claimants, all parties in interest, and others, on June 7, 1956. Such Notice and the Affidavit of Mailing of Ruth Brockman are annexed to this Certificate.

On June 5, 1956, an Order to Show Cause Why Property Should Not Be Sold Free and Clear of Liens, based upon Trustee's Petition filed May 21, 1956 and Supplemental Petition filed June 5, 1956, was signed and filed herein, and was directed to

each, every and all lien claimants of record, and listed in the Petition of May 21, 1956, to show cause before this Court in the [112] United States Post Office and Court House, Las Vegas, Nevada, on June 18, 1956 at 10:00 o'clock A.M. of said day why the Trustee should not be authorized to sell at public auction, pursuant to the Rules of this Court, free and clear of the lien holders mentioned and referred to in said Petitions, the real property therein described (being the real property involved herein), and further ordered that service of a copy of said Order be made upon said lien holders by regular mail, on or before June 7, 1956 which shall be deemed good and sufficient service of said Order and Notice.

Due Notice of the hearing upon Trustee's Petition to Sell Property Free and Clear of Liens, filed May 21, 1956, and upon the Supplemental Petition thereto, filed June 5, 1956, was given in accordance with the terms of said Order to Show Cause, to each, every and all lien-holders of record, and as listed in the aforesaid Petitions of May 21, 1956, by mailing said Order to Show Cause, on June 7, 1956, as well as to creditors of the Bankrupts, attorneys, and other parties in interest.

* * * * *

On June 18, 1956, at the time and place designated in the aforesaid Notices and Order to Show Cause, the Continued First Meeting of Creditors, and Hearings upon the aforementioned Petitions of Trustee came on regularly to be heard. There were present a large number of creditors, several

attorneys representing various secured and unsecured creditors, as well as other persons and parties interested in these bankruptcies.

The detailed particulars of said hearings will immediately follow this brief summarization thereof: (a) Counsel present were requested to note their appearance for the record, and the clients whom they represented; it appeared that Alexander Bisno and Jack Silverman, two of the Petitioners for Review, were represented by attending counsel; (b) an audible roll call of all the lien holders, lien claimants and tax authorities, listed in [113] the Petition, filed May 21, 1956, was made, and their presence or absence was noted; (c) the Referee directed any objections to the pending petitions be presented in writing and filed with the Court—none were filed; (d) counsel for Jack Silverman requested, and was granted time within which to present a suggested plan of arrangement, and was assured by the Referee that the suggested or any plan of arrangement would be welcomed with open arms; (e) a proposed Stipulation between Trustee, and LeRoy and Rosehedge, was presented in open Court for consideration and approval, which provided, among other things, that LeRoy and Rosehedge were permitted to use the value of their lien claims upon any bid made by them, or upon the payment of the purchase price, if they were successful bidders, at any sale of the bankrupt's property held pending the final determination of their Motion and Receiver's Objections thereto, and after discussion thereon, said

Stipulation was corrected and redrawn to eliminate the objections thereto, and as so corrected and redrawn, it again was presented and approved without objection, and then signed and filed; (f) Trustee's counsel offered the same Stipulation to all other lien holders and lien claimants in the order of their priority; (g) the Referee granted the pending Petitions and directed Trustee's counsel to prepare the appropriate order; (h) the sale, and all matters on the calendar were continued to July 30, 1956 at 10:00 A.M. at the same place.

The particulars of the proceedings had before the Referee June 18 and 19, 1956, are as follows:

"Referee: We will come to order. This is the time set for the continuance of the First Meeting of Creditors in both of these proceedings, which have been [114] consolidated, and also for the Hearing on the Petition of the Trustee to sell the Property of the Debtor, Free and Clear of Liens, together with the Hearing on the Petition of the Trustee to sell the Real Estate of the Debtors. Before proceeding further, we would like to have counsel and parties note their appearances for the benefit of the record." (Tr. Continued First Meeting, etc. of June 18-19, 1956, p. 1656.)

* * * * *

The Referee commenced the hearing upon the Petition of Trustee to Sell Real Property; certain objections were interposed, some of which were applicable to both Petitions. The Referee then directed that the hearings upon both petitions proceed at the same time, so that all objections could

go to both Petitions. Various counsel interposed objections. Mr. Blum objected that LeRoy and Rosehedge would be prejudiced seriously by any sale, pending the completion and determination of their Motion unless a proposed Stipulation with Counsel for Trustee, which had been prepared, but not signed, was acceptable to, and approved by the Court, wherein LeRoy and Rosehedge, among other things, would permit a sale of the real property free and clear of liens, pending the final determination of the LeRoy and Rosehedge Motion, and Objections thereto, on certain conditions, provided that LeRoy and Rosehedge could bid at any sale to be held, and could use the amount of the respective lien claims, in whole or in part, on account of any bids made by them, and in whole or in part, on account of the payment of the purchase price if they became the successful bidders. [117]

* * * * *

The Referee then granted the Petitions of the Trustee and directed Trustee's counsel to prepare the appropriate Order. [127]

* * * * *

Mr. Blum's request that the Stipulation be made a part of the Order, by reference, and approved by the Referee, also was granted. The Stipulation was signed and filed and approved by the Referee on June 19, 1956.

* * * * *

The portions of the Stipulation, so far as pertinent herein, in effect provided that pending determination of the LeRoy and Rosehedge Motion, and

the objections thereto, the real estate in question may be sold by the Trustee at public auction under the supervision and subject to the approval of this Court, free and clear of the lien of the pledges of LeRoy and Rosehedge, and of the lien of the Shulman trust deed, upon certain terms and conditions, including, (a) that such sale be without prejudice to the rights, and liens of LeRoy and Rosehedge, and the objections [128] of Receiver (Trustee); (b) that said property be expeditiously sold and confirmed within ninety days from June 20, 1956, unless extended by the Court for good cause shown; (c) that the liens of LeRoy and Rosehedge be transferred to the proceeds of sale in the amounts, order and priority, and with the same rights, benefits and privileges claimed or possessed by LeRoy and Rosehedge; and that the actual costs and expenses of insurance premiums, the actual and necessary costs of preservation of the estate, incurred since the Chapter XI proceeding, and the actual and necessary costs and expenses of sale be entitled to priority over the liens of Leroy and Rosehedge; (d) that LeRoy and Rosehedge be given ten days notice of sale, and of hearings upon applications for confirmation; (e) that LeRoy and Roschedge may be bidders at said sale, and entitled to use their lien claims, in whole or in part, on account of bids made, by them, and, as payment upon the purchase price, if they become the purchasers; (f) that if they are the purchasers a trustee's deed, and possession, be delivered to LeRoy and Rosehedge, who shall have the use and possession of the prop-

erty free from the claims of Trustee except to pay Trustee for the actual insurance premiums incurred, the actual and necessary costs and expenses of preserving the estate, and the actual and necessary costs of sale, and that until final determination of said Motion and Objections, said real property cannot be transferred, conveyed or encumbered by them; (g) that if their liens be finally upheld in an amount equal to or greater than the purchase price, LeRoy's and Rosehedge's title to the property free and clear of any rights, or title of the Trustee, or these Estates; (h) that if their liens be finally determined to be invalid, in whole, or in part, LeRoy and Rosehedge shall immediately pay to Trustee that portion of the purchase price for which they received credit by virtue of their lien-claims; (i) that any dispute regarding costs and expenses of preservation and insurance be submitted to and determined by the Court; (j) that if LeRoy and Rosehedge are not [129] purchasers of said property, and their liens are upheld by the Referee, the amount thereof, as determined, shall be paid to them, and if the Trustee reviewed or appealed from said decision, LeRoy and Rosehedge agreed in writing, which would be guaranteed by Court approved individuals to repay such sums to the Trustee to the extent their lien claims were finally determined invalid, and for which they received payments.

Other portions of said Stipulation set forth the items to be included in determining the amount of the claims, and a description of the real property involved.

At the conclusion of the hearings on June 19, 1956, the Continued First Meeting of Creditors in these proceedings, the Hearings, and the Notices of Hearings of the aforementioned Trustee's Petitions; Notice of Sale and the said Sale, and all matters on the calendar, were continued by the Referee to July 30, 1956, at the hour of 10 o'clock a.m. at the United States Post Office and Court-house at Las Vegas, Nevada.

On July 6, 1956, the Order for Sale of Property and Order Authorizing Sale of Property Free and Clear of Liens was presented to, and signed and filed by the Referee. Said Order is annexed to this Certificate.

Said Order, by its terms (a) overruled all objections made to the aforementioned Petitions of Trustee; (b) approved the Stipulation entered into on June 19, 1956 between Counsel for Trustee and Rosehedge and made the same a part of said Order. (c) authorized the Trustee to sell the property of the Bankrupts, in accordance with the terms of the Bankruptcy Act, including the real property therein described, and including the furniture, fixtures, and other personal property contained therein, upon such terms and conditions as the Court shall hereafter approve; (d) authorized the Trustee to sell, in accordance with the terms of the Bankruptcy Act, the property described therein, free and clear of the lien set [130] forth in the Petition filed May 21, 1956, and enumerated the various liens and lien claimants affected thereby. (Included therein are the liens of LeRoy and

Rosehedge, the Shulman Trust Deed lien, the liens of the Petitioners herein, and the lien of Lawrence Hawthorne, d.b.a. Hawthorne Construction Co.); (e) ordered the liens listed therein be transferred to the proceeds of the sale, subject to the terms of the June 19, 1956 Stipulation; and (f) ordered that the actual costs insurance premiums and the actual and necessary costs and expenses of preservation incurred since the filing of the Petitions in Bankruptcy, including the actual and necessary costs and expenses of sale, shall be entitled to priority over, and were prior to the liens described in said Order, and the claims of general creditors.

* * * * *

On July 30, 1956, the Continued First Meeting of Creditors, the Continued Hearings on the Petitions of the Trustee, and particularly the Petition for Authority to Sell, and all matters noticed for hearing on June 18-19, 1956, and, the matter of the sale were held before the Referee, at the United States Post Office and Courthouse, Las Vegas, Nevada, at 10 o'clock a.m. No sale was held as the Trustee was unable to advertise the same, due to lack of funds. [131]

* * * * *

The Continued First Meeting of Creditors, the matter of the sale, and notice thereof; the Hearings upon Trustee's Petition to sell the real property, and the Notice of Hearing thereof, were, and each of them was, then continued by the Referee to September 10, 1956 at 10:00 A.M. in the United States Post Office and Courthouse at Las Vegas, Nevada.

On September 10, 1956, at the aforesaid time and place, all the aforementioned matters came on to be heard before the Referee.

* * * * *

Thereupon, the Referee continued the said sale, and the time and notice thereof, the Continued First Meeting of Creditors, the Continued Hearing upon Trustee's Petitions to Sell the Real Property, and the Notice of Hearing thereof and all matters on the calendar, to October 8, 1956 at the hour of 10:00 o'clock a.m. in the United States Post Office and Court House, Las Vegas, Nevada.

On October 8, 1956, at the aforesaid time and place, the matter of the said sale, the Continued First Meeting of Creditors, the Continued Hearing upon Trustee's Petition to sell Real Property, and the Notice of hearing thereof, and other matters, came on regularly for hearing before the Referee.

* * * * * [132]

The said sale, and the notice thereof, the Continued First Meeting of Creditors, the Continued Hearing upon Trustee's Petition to Sell Real Property, and the Notice of hearing thereof, and other matters, were continued, for good cause shown, by the Referee, to November 27, 1956, at the hour of 10:00 o'clock A.M. in the United States Post Office and Court House, at Las Vegas, Nevada. [133]

* * * * *

On November 27, 1956, the said Sale, the Continued First Meeting of Creditors, and the Continued Hearing upon Trustee's Petition to Sell Real Property, and other matters, came on regularly

to be heard before the Referee, at the aforementioned time and place, and the Referee in open Court offered for sale at public auction, the said real property and personal property of the Bankrupts free and clear of liens. Mr. Katz, on behalf of LeRoy and Rosehedge made a bid in the amount of their lien claims. One other bid was made—partly in cash and the balance thereof payable over a period of years. This bid was inadequate and unacceptable.

* * * * *

The Referee, therefore, rejected all bids, and the Sale, and Notice thereof, the Continued First Meeting of Creditors, the Continued Hearing upon the Trustee's Petition to Sell Real Property, and the Notice of hearing thereof, and all matters on the calendar, were, and each of them was continued by the Referee to January 25, 1957 at the hour of 10:00 o'clock A.M. in the United States Post Office and Court House, at Las Vegas, Nevada.

On January 25, 1957, at the aforesaid time and place, the said sale, the Continued First Meeting of Creditors, the Continued Hearing upon Trustee's Petition to Sell Real Property, and other matters, came on regularly to be heard before the Referee. The Referee again offered the said real and personal property for sale at public auction, in Open Court. [134] * * * * *

After some discussion, and there being no other bids, and to give general creditors an opportunity to obtain something on their claims, the Referee, upon payment of the said \$5,000.00, continued the

Sale, and the Notice thereof; the Continued First Meeting of Creditors; the Continued Hearing upon the Trustee's Petition to Sell Real Property, and the Notice of Hearing thereof, and other matters, to February 26, 1957, at the hour of 10:00 o'clock A.M. in the United States Post Office and Courthouse, at Las Vegas, Nevada.

On February 26, 1957, at the time and place, as aforesaid, upon the request of Mr. Frazer for additional time, and upon payment of an additional \$2500.00 to the Trustee to help defray expenses during the period of continuance, and there being no other bids, the Referee continued the said Sale, and the Notice thereof, the Continued First Meeting of Creditors, the Continued Hearing upon Trustee's Petition to Sell Real Property and the Notice of Hearing [135] thereof, and other matters, to May 23, 1957 at 10:00 o'clock A.M. at the United States Post Office and Court House, Las Vegas, Nevada.

On May 23, 1957, at said time and place, and upon the request of Mr. Frazer for additional time, and upon the payment of an additional \$2500.00 to the Trustee to help defray expenses during the period of continuance, and there being no other bids, the Referee continued the said Sale, and Notice thereof; the Continued First Meeting of Creditors; the Continued Hearing upon Trustee's Petition to Sell Real Property, and the Notice of Hearing thereof, and other matters, to July 22, 1957 at 10:00 o'clock A.M. at the United States Post Office and Courthouse, Las Vegas, Nevada.

On July 22, 1957, at said time and place, and upon Mr. Frazer's request for a further continuance, and upon the payment of an additional \$2500.00 to Trustee to help defray expenses during the period of continuance, and there being no further bids, the Referee continued the Sale, and Notice thereof; the Continued First Meeting of Creditors; the Continued Hearing upon the Trustee's Petition to Sell Real Property, and the Notice of Hearing thereof, and all other matters, to September 6, 1957, at the hour of 10:00 o'clock A.M. at the United States Post Office and Courthouse, Las Vegas, Nevada.

On September 6, 1957, at the aforesaid time and place, the matter of the sale of the property of the Bankrupts, the Continued First Meeting of Creditors, the continued Hearing on Trustee's Petition to Sell Real Property, and other matters came on regularly to be heard before the Referee. This meeting was well attended. A large number of people, creditors, and other persons and parties interested in the Bankrupt estates were present. The Trustee, and his counsel, counsel for LeRoy and Rosehedge, Mr. Frazer, among others, were present. None of the Petitioners for Review were present, either in person, or by counsel. After disposing of certain other matters, the Referee announced that he was conducting a sale of the property of the Bankrupts at public auction in open Court, and [136] requested bids for the same. Mr. Katz then submitted a bid, for and on behalf of his clients, LeRoy and Rosehedge, and explained that

said bid, for convenience, was being made in the name of S. Kohn, who was a secretary in his office, but, that in fact, said bid was the bid of LeRoy and Rosehedge. He then proceeded to make the bid, and read a written bid which he had prepared. He thereupon submitted the written bid to the Referee. The Referee then read aloud the terms of said written bid to all persons present in Court. According to the terms of said bid, S. Kohn offered to purchase the real property then being offered for sale, and the improvements thereon, for the sum of \$116,000.00 cash, free and clear of all liens, claims, and taxes, except the following: (1) Certain specified and announced State, County and City taxes therein particularly enumerated; (2) Certain specified street improvement assessments therein particularly described; (3) the aforementioned \$600,000.00 Shulman deed of trust, therein particularly described; (4) the assignment thereof by Bisno and Bisno, Inc. to Alexander Bisno and Louis Rubin, therein particularly described; (5) the assignment and pledge of said deed of trust by Alexander Bisno and Louis Rubin to LeRoy Investment Co., Inc., therein particularly described; and (6) the assignment and pledge of the said deed of trust by Alexander Bisno and Louis Rubin to Rosehedge Corporation, therein particularly described; said exceptions being sub-paragraph 1, 2, 5, 6, 7 and 8 of paragraph (4) of Referee's Order dated July 6, 1956; said bid further provided that additionally, and for the same consideration, and part of said transaction, there shall be conveyed

to said purchaser, by bill of sale, all of Trustee's right, title and interest, in and to all the furniture, furnishings, gaming equipment of all kinds, and all other tangible personal property pertaining to the business of Moulin Rouge, but subject, however, to all valid and subsisting conditional sales contracts and chattel mortgages against the said personal property. Said bid further provided that such sale shall be consummated through an escrow to be opened upon the acceptance of said bid by the Court; the purchase price shall be [137] paid through escrow, and purchaser shall obtain policy of title insurance guarantying title to be free and clear, except as provided in said bid. Additionally, said bid included, and bidder orally agreed to pay all costs of escrow, including a certain sewer assessment, the cost of the title insurance policy, and that utilities and insurance were to be pro-rated. Said bid is annexed to this Certificate. The Referee then ordered the bid filed and asked for other bids. Thereupon, Mr. Frazer announced that he would like to have the sale recessed for an hour, or longer, to enable him to confer with Mr. Katz, and the attorney for Coast Distributing Co., to ascertain if the plan he was about to propose would be acceptable to their respective clients. He stated that his clients had lost the A.E.C. lease, but there still was a possibility that they might get it; that nevertheless, his clients had a contingent offer of a loan of \$350,000.00 with interest at 10% per annum, subject to terms to be subsequently worked out, and that such loan would have to be secured

by a new first deed of trust upon the real property then being offered for sale. Under said proposal, Coast Distributing would, according to Mr. Frazer, be required to leave their personal property on the premises for a considerable number of years, and LeRoy and Rosehedge would have to subordinate their first lien to the new deed of trust which his clients would be required to give, and the balance of the LeRoy and Roschedge lien claims would be paid to them in installments over a period of approximately ten years; thereafter, other lien claimants and general creditors might realize something, if all worked out well. The Referee then asked if there were any other bids and there were none. At the request of Mr. Frazer, and still hoping something could be saved for general creditors, the Referee recessed the sale until 1:30 P.M. of said day, to enable Mr. Frazer to consult with Mr. Katz, the attorney for Coast Distributing [138] Co., and Mr. Quittner, attorney for the Trustee.

The Court re-convened at 1:30 o'clock P.M. for the afternoon session. The Referee inquired of Mr. Frazer if he had been able to arrive at any agreement with other counsel regarding his proposed offer. Mr. Frazer stated that he was unable to do so. He then made an oral bid to purchase the property offered for sale, free and clear of all liens for the consideration, and upon the conditions previously outlined by him during the morning session. Counsel for Coast Distributing objected to such bid. Mr. Quittner then asked Mr. Frazer what provision he intended to make for the

payment of real estate taxes which then had accrued in the amount of approximately \$52,000.00, a greater part of which had accrued since the filing of these proceedings. Mr. Frazer said that the only amount of money that was available was the proceeds of the loan the bidder hoped to finalize on the property they were bidding on, which was not sufficient to take care of those taxes, and that he did not know how the real estate taxes would be handled.

It was apparent that the Court was powerless to compel secured creditors to subordinate their existing security to a hoped for first deed of trust which might or might not be finalized.

Mr. Katz pointed out that the proposed loan of \$350,000.00 was not a firm offer, but was dependent upon the lender and borrower agreeing upon terms satisfactory to the lender. In support of such statement, Mr. Katz read a telegram in the possession of Mr. Frazer, and sent by the proposed lender, to that effect. Mr. Katz further [139] pointed out that under such plan and bid, LeRoy and Rosehedge were required to subordinate their present first lien security to a first deed of trust in favor of the proposed lender; that from the proceeds of such loan, his clients would receive approximately one-third of their claim, and that it would take ten years to pay off the balance, even assuming that the business lease contemplated by Mr. Frazer's clients was successful and profitable; and, even then, that the unsecured creditors might, or might not, receive anything.

The Referee stated that for two years the uppermost thought in his mind was to assist general unsecured creditors; that he had restrained secured creditors from proceeding to foreclose their security for that length of time; that the Trustee had used every effort to sell the assets without avail; plans of arrangement were proposed, but no feasible one had been presented; that under the law and the Bankruptcy Act, he could not forever keep the secured creditors from enforcing their rights; that the property was depreciating, and costs and expenses were rapidly mounting; that a report just submitted by the Trustee showed that approximately \$52,000.00 of real estate taxes had accrued, and were unpaid, the greater portion thereof since the commencement of these bankruptcy proceedings, which were a cost of administration; that the unpaid costs and expenses of preservation of the assets incurred by the Receiver and Trustee were in excess of \$70,000.00; these and taxes were accumulating at the rate of in excess of \$6,000.00 per month; that costs of administration have been incurred and were unpaid; that this property has been extensively advertised for long periods of time throughout the United States by the Trustee, and yet no bid, or offer, had been received or submitted which could be accepted by the Referee; that the offer and bid made by [140] Mr. Frazer was not a firm bid; it was too contingent and depended upon too many uncertainties; it required further delays, and required the consent of all lien holders, and, apparently, such consents were

not forthcoming; the Referee could not compel such consents; that the time has come when the Referee must do something to stop the mounting expenses, and that under the law and the Bankruptcy Act, he could not delay the proceedings any longer; that the bid made by Mr. Frazer was a contingent bid and could not be accepted by the Referee in its present form. The Referee then asked if there were any other bids to be made, or if any other person present desired to make any other or further bid. Mr. Katz then renewed his previous bid. Again the Referee asked for other or further bids, and no other or further bids were made. Thereupon, the Referee announced the acceptance of the bid made by Mr. Katz in the name of S. Kohn for and on behalf of LeRoy and Rosehedge as the highest and best bid made, and there being no objections thereto, directed Trustee's counsel to prepare and present for signature an appropriate Order confirming said sale to S. Kohn.

* * * * *

The Referee then proceeded with the hearing of some matters on the calendar, following which the continued First Meeting of Creditors was adjourned.

Immediately after the adjournment of the meeting, the escrow, as provided in the S. Kohn bid, was opened at the Pioneer Title Insurance and Trust Company at Las Vegas, Nevada, and is now pending.

On September 23, 1957, the Referee signed and filed the Order Confirming Sale. [141]

None of the Petitioners for Review was present at, or objected to the sale held on September 6, 1957. From September 6, 1957 to September 23, 1957, none of the Petitioners for Review made any oral or filed any written objections to said sale, nor did any of them during such time interpose any objections to the confirmation of said sale. Yet, a period of seventeen days intervened between the sale and the signing of the Order Confirming Sale.

* * * * *

It appears that under the Stipulation of June 19, 1956, and the Referee's Order of July 6, 1956, LeRoy and Rosehedge were permitted to utilize, in whole or in part, the amount of their lien claims in connection with any bid made by them, or purchase price to be paid by them. The bid by Mr. Katz on September 6, 1957 in the name of S. Kohn was announced as, and, in fact, was the bid of and on behalf of LeRoy and Rosehedge, and was so considered and treated by the Referee, and all persons present at said sale. This bid was made subject to the liens and claims of LeRoy and Rosehedge. This, in the opinion of the Referee, at the time of sale, was the equivalent of utilizing the value of the LeRoy and Rosehedge claims upon the bid made. Had the bid been increased by the value of such lien claims, a credit upon the purpose price in the amount of the value of the said lien claim would have had to be given. Such procedure would have been a useless and idle act. (6 Remington-Henderson—114; *In re Harralson*, 179 F. 490, 492, 493. Under similar circumstances, the Court

states, "The Creditor was entitled to have the purchase price credited on his allowed claim. It would have been a useless ceremony for him to pay the \$1500.00 into Court and [142] then have it repaid to him after credit on his allowed claim." See also *Wolffgram v. Marsh*, 280 F. 865, 866.)

No objection was interposed to the bid when made; it was the highest and best bid presented at the sale; no objection was interposed to said bid, or sale at or prior to the signing of the Order Confirming Sale. The Order of July 6, 1956, provided that the Trustee was authorized to sell said real and personal property "upon such terms and conditions as the Court shall hereafter approve." Petitioners for Review interposed no objections thereto when said bid was made, nor thereafter prior to the signing of the Order Confirming Sale. They have not shown that a higher or better bid or offer can be obtained.

The Status of the Petitions For Review to Review the Order of September 23, 1957

Section 39 (c) of the present Bankruptcy Act limits the right to review to "a person aggrieved". Additionally, the decisions indicate that the right to review may be lost by estoppel. (See cases cited in 8 *Remington on Bankruptcy* (Henderson) 294.) Generally, any one who desires to file objections to a sale should do so immediately, as objections generally are too late after confirmation. (See *Shamokin Lumber & Construction Co.*, 54 F. Supp. 480.)

* * * * * [143]

2. Millie Sterrett—Chattel mortgage claimant. The matters set forth in Referee's Certificate on Review from the September 6, 1957 Order (pp. 24-25) relating to Millie Sterrett, are equally applicable herein, and said matters are made a part hereof by reference.

Additionally, the record shows that on June 7, 1956, there was mailed to Millie Sterrett a copy of the Order to Show Cause Why Property Should Not Be Sold Free and Clear of Liens, issued July 5, 1956, and Notice of Hearing on the Petitions set for June 18, 1956. She neither appeared in person or by counsel at that hearing, nor at any hearing, meeting, or proceeding in these Bankruptcy matters, subsequent thereto. She was not present at the sale, and no bid on her behalf was made, nor any objections [144] interposed to the bid or sale. She was given notice of the hearing on the Petition to Sell, and of the sale, the First Meeting of Creditors, and all Continued First Meeting of Creditors. She filed no objections or exceptions to the bid or sale between the date of sale, and the Order Confirming Sale. The Order Confirming Sale expressly protects her rights as a chattel mortgage lien claimant. It provides that said personal property was sold "subject to all valid and subsisting conditional sales contracts and chattel mortgages against said personal property." Whatever rights she may have in respect to her chattel mortgage, such rights are expressly preserved to her under the Order Confirming Sale. No showing has been made that Alexander Bisno has any authority

to file said Petition for Review for or on her behalf. She makes no showing that a higher or better bid or sale can be obtained. It is respectfully submitted that she is not a person aggrieved by the Order of September 23, 1957, and is estopped from reviewing said Order. Likewise, her objections to said Order are not timely. [145]

* * * * *

Whether the S. Kohn bid was one to purchase the property, subject to the liens of LeRoy and Rosehedge, or was one to purchase the property, free and clear, by increasing the bid by the amount of such liens and then receiving a credit upon the purchase price in the amount of such liens, the result is the same.

* * * * *

The net amount of the money received by the Trustee in either case is identical. But the bid, subject to certain real estate taxes, was more beneficial to all creditors, secured and unsecured, than a free and clear bid, for in a bid subject to taxes, no part of the proceeds of the sale was charged with such taxes.

Furthermore, the bid and sale complied with the terms of the July 6, 1956, Order, which expressly provided for the sale of the real property therein described "including the furniture, fixtures, and other personal property contained therein, upon such terms and conditions as the Court shall hereafter approve." (July 6, 1956 Order page 3, lines 23-26.)

The Referee approved and confirmed the sale

upon [147] such terms and conditions as specified in the bid. No higher or better bid was made or received during the sale. His rights, as a holder of a chattel mortgage, are fully protected by the Order Confirming Sale wherein the sale of the personal property was confirmed "subject to all valid and subsisting conditional sales contracts and chattel mortgages."

* * * * *

Status of The Record

After careful consideration of all the evidence and the proceedings had and taken in connection with and during the sale of the property involved herein, the Referee advises the Honorable Court that the Record discloses:

1. That the bid of S. Kohn made on September 6, 1957, in open Court, for the purpose of the real and personal property then offered for sale was, in fact, the bid of LeRoy and Rosehedge, who, in reality, made said bid for themselves, in the name of S. Kohn.

2. That said bid of S. Kohn was the highest and best bid made and received at the said sale on September 6, 1957, and was the highest and best bid that could have been obtained for said property.

3. That the said bid of S. Kohn and the sale to S. Kohn made pursuant thereto conforms, in form and effect, with the terms and provisions of the Stipulation of June 19, 1956, and the Order of July 6, 1956.

4. That the said sale conducted by the Referee in Open Court on September 6, 1957, was a public

sale, and was legally [148] made, and fairly and impartially conducted, and was and is in all respects regular and in accordance with the Orders of this Court, and the provisions of the Bankruptcy Act.

5. That due notice of the time and place of sale was, and has been given to all creditors of the above Bankruptcy estates, and to all lien holders and lien claimants, attorneys, and other parties in interest, as required and provided by law and the provisions of the Bankruptcy Act.

6. That due notice of said Sale and the time and place thereof, was given to the general public in the form and manner, and for such time as required by law and the Bankruptcy Act.

7. That the sale made on September 6, 1957 to S. Kohn, and confirmed by Order of September 23, 1957, is in the best interests of the above Bankrupt Estates.

8. That none of the Petitioners for Review objected to the form of the bid, or to the sale, at or during the conduct of said sale on September 6, 1957, or at any time thereafter up to and including the time of the signing or filing of the Order Confirming Sale on September 23, 1957.

9. That no written objections or exceptions were ever filed, or any oral objections interposed, by Petitioners for Review, or any of them, or by any one else, to the bid made by S. Kohn, or to the Sale made in Open Court on September 6, 1957, or to either the bid or sale, or to any Order Confirming said Sale, at any time prior to the signing and filing

of the Order Confirming Sale on September 23, 1957. [149]

The Question Presented

1. Is the Order of September 23, 1957, supported by the evidence, and record of proceedings herein?

2. Was the Sale held in Open Court before the Referee on September 6, 1957, and confirmed by Order Confirming Sale on Septemebtr 23, 1957, legally made and fairly conducted and regular in all respects, and in accordance with the Orders of this Court and the provisions of the Acts of Bankruptcy?

3. Are the Objections and Exceptions of Petitioners for Review to the sale held on September 6, 1957, and confirmed on September 23, 1957, timely taken?

4. Are Petitioners for Review entitled to be heard herein, and have such Petitioners any standing before the District Court on Review?

5. Should the Petitions for Review be dismissed because the Petitioners on Review are either persons who are not aggrieved by the Order complained of, or are persons who have lost their rights to review such Order?

6. Should the Petitions for Review be dismissed because of the insufficiency of such Petitions for Review, both in form and contents? [150]

* * * * *

Dated: October 21, 1957.

/s/ JOHN C. MOWBRAY,

Referee in Bankruptcy. [151]

[Endorsed]: Filed October 22, 1957.

[Title of District Court and Causes.]

MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR REVIEW OF REFEREE'S
ORDER OF SEPTEMBER 23, 1957

A. The Parties.

The parties to said Petition for Review are Millie Sterett, a secured creditor, Bernice Gurewitz, a general unsecured creditor and Alexander Bisno, a general partner of the bankrupt.

* * * * *

G. Position of Millie Sterett.

Petitioner Millie Sterett holds a chattel mortgage which admittedly was recorded subsequent to the chattel mortgage held by Rosehedge. Rosehedge asserts that its chattel mortgage covers the same personal property as the Millie Sterett chattel mortgage.

In the Certificate on Review prepared by the attorney for Rosehedge and signed by the Referee, the following appears on Pages 38 and 39 thereof:

“It appears that under the Stipulation of June 19, 1956, and the Referee's Order of July 6, 1956, Leroy and Rosehedge were permitted to utilize, in whole or in part, the amount of their lien claims in connection with any bid made by them, or purchase price to be paid by them. The bid by Mr. Katz on September 6, 1957 in the name of S. Kohn was announced as, and, in fact, was the bid of and on behalf of Leroy and Rosehedge, and was so

considered and treated by the Referee, and all persons present at said sale. This bid was made subject to the liens and claims of Leroy and Rosehedge. This, in the opinion of the Referee, at the time of sale, was the equivalent of utilizing the value of the Leroy and Rosehedge claims upon the bid made. Had the bid been increased by the value of such lien claims, a credit upon the purchase price in the amount of the value of the said lien claim would have had to be given. Such procedure would have been a useless and idle act. (6 Remington—Henderson—114; *In re Harralson*, 179 F. 490, 492, 493. Under similar circumstances, the Court states, ‘The Creditor was entitled to have the purchase price credited on his allowed claim. It would have been a useless ceremony for him to pay the \$1500.00 into Court and then have it repaid to him after credit on his allowed claim.’ See also *Wolffgram v. Marsh*, 280 F. 865, 866.)”

Thus, it is obvious that the claim of Rosehedge has been satisfied, by utilizing the full amount of said claim in making the bid on the property at the time of sale. Although Rosehedge was protected by two securities, the Rosehedge chattel mortgage and the pledge of the Shulman trust deed, it is obvious that Rosehedge is entitled to but one satisfaction. Having been satisfied once, Rosehedge has no further claim under its chattel mortgage. This, however, Rosehedge refuses to acknowledge. Thus, Millie Sterett is aggrieved by the Order of September 23, 1957 and this proceeding, in the event the

Referee's Orders are affirmed, should adjudicate that as a condition precedent to completion of the escrow heretofore opened by Rosehedge and Leroy, there should be placed on deposit therein a discharge and satisfaction of the Rosehedge chattel mortgage to be recorded upon close of escrow.

Wherefore, petitioners pray that the Honorable District Court order the above entitled matter to be sent back to the Referee for additional hearings; that said Order of September 23, 1957 be reversed and that in the event the Honorable District Court should affirm said Referee's Order, said Court should adjudicate that as a condition precedent to completion of the escrow heretofore opened by Leroy and Rosehedge, there should be placed on deposit therein a discharge and satisfaction of the Rosehedge chattel mortgage to be recorded upon close of escrow and for such other relief which the Court deems proper and just.

Respectfully submitted,

ARTHUR N. GREENBERG,
ROBERT COHEN,

/s/ By ARTHUR N. GREENBERG,

Attorney for Petitioners Alexander Bisno, Millie Sterett and Bernice Gurewitz.

[Endorsed]: Filed October 28, 1957.

[Title of District Court and Causes.]

JOINDER OF MILLIE STERETT
IN PETITIONS FOR REVIEW

The undersigned Millie Sterett has authorized Alexander Bisno to sign on her behalf the Petitions for Review of Referee's Orders dated September 6, 1957 and September 23, 1957 filed herein.

Millie Sterett hereby personally joins in said Petitions for Review.

Millie Sterett has read said Petitions for Review and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated upon information or belief and as to those matters, she believes them to be true.

Dated: October 25, 1957.

/s/ MILLIE STERETT.

Duly Verified.

[Endorsed]: Filed October 28, 1957.

In the District Court of the United States
for the District of Nevada

In Bankruptcy No. 921

IN THE MATTER OF THE PROPERTIES
MOULIN ROUGE, INC., a corporation and
successor in interest to MOULIN ROUGE, a
Limited Partnership, Bankrupt.

In Bankruptcy No. 925

IN THE MATTER OF MOULIN ROUGE, a
Limited Partnership, Bankrupt.

ORDER CONFIRMING, AFFIRMING AND
APPROVING REFEREE'S ORDER,
DATED SEPTEMBER 23, 1957, AS MODI-
FIED BY COURT

At Las Vegas, in Said District, on the 7th Day
of November, 1957.

The following Petitions for Review, to wit: (a) Petition for Review of Referee's Order dated September 23, 1957, filed by Alexander Bisno, (and Alexander Bisno on behalf of Millie Sterett and Bernice Gurewitz); (b) Petition for Review of Referee's Order dated September 23, 1957, filed by Jack Silverman; (c) Petition for Review of Referee's Order dated September 23, 1957, filed by Lawrence Hawthorne; and (3) Petition for Review of Referee's Order Confirming Sale of Property Free and Clear of Liens, Excepting Certain Speci-

fied Liens, filed by the District Director of Internal Revenue, for the District of Nevada, came on regularly to be heard on the 28th day of October, 1957, at the hour of 1:30 o'clock p.m. of said day, before the Honorable John R. Ross, United States District Judge for the District of Nevada, sitting at Las Vegas, Nevada; the Petitioners, Alexander Bisno, Millie Sterett and Bernice Gurewitz, appearing by their counsel, Arthur N. Greenburg, Esq. [152] and Robert Cohen, Esq.; and the Petitioner, Jack Silverman, appearing by his counsel, Messrs. Fink, Leventhal and Lavery, by Cyrus Leventhal, Esq. and Thomas A. Foley, Esq.; and the Petitioner, Lawrence Hawthorne, appearing by his counsel, Harry E. Claiborne, Esq.; and the Petitioner, District Director of Internal Revenue, appearing by his counsel, Franklin Rittenhouse, Esq., United States Attorney, and Howard W. Babcock, Esq., Assistant United States Attorney, and Leon Yudkin, Esq., Assistant Regional Counsel for the Internal Revenue Department; and the Respondents, LeRoy Investment Co., Inc. and Rosehedge Corporation, appearing by their counsel, Charles J. Katz, Esq., Samuel W. Blum, Esq., and William G. Ruymann, Esq.; and the Trustee, Harry E. Miller, appearing by his counsel, Messrs. Quittner, Stutman and Treister, by Francis F. Quittner, Esq. and Messrs. Morse, Graves and Compton, by Harold Morse, Esq., and the Petition of the District Director of Internal Revenue having been amended at said hearing to specifically refer to Referee's Order dated September 23, 1957, and it having

been stipulated between counsel for Respondents and counsel for District Director of Internal Revenue, and counsel for Trustee that the following provision of Referee's order, dated September 23, 1957, reading as follows:

“(1) State, County and City Taxes for the period January 1, 1955 through June 30, 1955, and to date now due and payable, or owing though not now payable.”,

be deleted therefrom, and that said Order be modified in the particulars hereinafter set forth; and it further being stipulated between counsel for Respondents and counsel for Trustee that the bid of S. Kohn be increased in the sum of \$1500.00 to cover the cost of preservation of the real and personal property involved herein, from the date of sale to the date when possession of said real and personal property shall be delivered to said Purchaser, S. Kohn, or nominee; and the matters in support of said petitions having been fully argued by counsel for the respective Petitioners, and the matters in opposition to such petitions having been fully argued by counsel for the Respondents and by counsel for Trustee, and the matter having been submitted to the Court for deliberation and consideration, and the Court having duly [153] considered the same; and it further appearing to the Court that the statements of fact and the recitals of the proceedings had, as set forth in the aforementioned Referee's Order, dated September 23, 1957, are correct, and by reference are made a part

hereof, and that each of the Petitioners on Review herein were given and received due notice of each and all of said proceedings, including the notice of hearing of Trustee's Petition to Sell Real Property and of Trustee's Petition to Sell Property Free and Clear of Liens, and the Supplemental Petition thereto, and having interposed no objections thereto, and that on the 6th day of July, 1956, an Order was duly made by the Referee and filed in the above bankrupt proceedings authorizing the sale of said real property therein described, and involved herein, in accordance with the terms of the Bankruptcy Act, and further authorizing the sale of the property therein described and referred to, free and clear of liens; and it further appearing that none of the Petitioners on Review, or anyone else, interposed any objections to said Order of July 6, 1956; or took any reviews therefrom, and that the said Order of July 6, 1956, has become and now is final; and it further appearing to the Court that none of the petitioners on Review appeared at the said sale held on September 6, 1957, before the Referee in open Court, excepting only the Petitioner, Lawrence Hawthorne, who appeared by his attorney, and that at such sale no objections to the bid made by S. Kohn, or to the form of said bid, were interposed for, or on behalf of any of the Petitioners on Review, or by anyone else; that no bid for or on behalf of any of the Petitioners on Review was made at said sale; that no objections or exceptions to the said sale, or to the bid made by S. Kohn thereat, or to the form of said bid, or to the confir-

mation of said sale, were made or filed by or on behalf of any of the Petitioners on Review, or by anyone else, at any time prior to the signing and filing on September 23, 1957, of the Referee's Order confirming said sale; and that none of the Petitioners on Review have shown that any higher or better bid, offer or sale can be had for the property involved herein; and it further appearing to the Court that the said bid of S. Kohn, and the sale made pursuant thereto, on the 6th day of September, 1957, and confirmed by Referee's Order, dated September 23, 1957, complied with the terms of Referee's Order of [154] July 6, 1956; that said bid made by S. Kohn on September 6, 1957, in open Court, was made in behalf of LeRoy Investment Co., Inc. and Rosehedge Corporation; that the bid of S. Kohn was the highest and best bid made and received at said sale and was the highest and best bid that could have been obtained for said property, and conformed, in form and effect, with the terms and provisions of the Order of July 6, 1956; that said sale conducted by the Referee in open Court on September 6, 1957, was a public sale, and was legally made and fairly and impartially conducted, and was in all respects regular and in accordance with the Orders of this Court, and the provisions of the Bankruptcy Act; that due notice of the time and place of sale was given to all creditors of the above Bankrupt Estates, and to all lien holders and lien claimants, attorneys, and other parties in interest, including all of the Petitioners on Review, as required and provided by law, and

the provisions of the Bankruptcy Act; and that due notice of said sale and the place and time thereof was given to the general public in the form and manner and for the time as required by law and the Bankruptcy Act; and that the said sale is in the best interests of the Bankrupt Estates;

Now, Therefore, Good Cause Appearing, It Is Hereby Ordered, Adjudged and Decreed As Follows:

I.

That the Order of the Referee, dated September 23, 1957, and entitled, Order Confirming Sale of Property Free and Clear of Liens, Excepting Certain Specified Liens, be, and the same is hereby modified, in the following particulars:

That certain provision of the aforementioned Referee's Order, on Page 5 thereof (lines 5 to 7 inclusive), and reading as follows:

“(1) State, County and City Taxes for the period January 1, 1955 through June 30, 1955, and to date now due and payable, or owing though not now payable.”

shall be, and the same is hereby deleted and stricken from the [155] aforesaid Order, and in lieu thereof, the following provision shall be, and hereby is inserted therein, and shall be, and is applicable thereto, to wit:

“(1) All Federal, State, County and City taxes now due and payable; and all State, County and City taxes which will be due and payable, or will

be owing, though not payable, up to and including the date of the close of the escrow hereinafter mentioned, including all State, County and City taxes accruing, or to accrue, since the filing of the Chapter XI proceedings herein on October 19, 1955, but in a total amount not in excess of the total sum of \$52,000.00, for the total of all such Federal, State, County and City taxes, as aforesaid; and the Referee hereafter shall determine and fix the nature, order, rank, priority and amount of the respective portions of the said \$52,000.00 to which each of the aforesaid tax claimants are, or may be entitled, including such State, County and City taxes accruing, or to accrue, since the filing of the Chapter XI proceedings herein on October 19, 1955, and up to and including the date of the close of the escrow hereinafter mentioned; that except for the aforementioned taxes, in an amount not in excess of the total of \$52,000.00, for the total of all Federal, State, County and City taxes, as aforesaid, the real property described in Referee's Order, dated September 23, 1957, and the personal property therein referred to, are, and each is, sold free and clear of all Federal, State, County and City taxes, and tax liens, up to and including the date of the close of the escrow hereinafter mentioned." [156]

II.

That the aforementioned Order of the Referee, dated September 23, 1957, as herein modified, be, and the same is hereby affirmed, confirmed, and approved in all respects.

That the sale of the real property described in the aforementioned Order of the Referee, dated September 23, 1957, and sold and confirmed to S. Kohn, is a sale free and clear of all taxes, liens and encumbrances, and particularly the taxes, liens and encumbrances set forth in Referee's Order, dated July 6, 1956, entitled, Order For Sale of Property and Order Authorizing Sale of Property Free and Clear of Liens, except as otherwise expressly provided in Paragraph I hereof, and in Subparagraphs (2), (3), (4), (5) and (6), of the Order of the Referee, dated September 23, 1957, as set forth on Pages 5 and 6 thereof.

III.

That the Petition for Review of the aforementioned Order of the Referee, dated September 23, 1957, filed by Alexander Bisno and Bernice Gurewitz, be, and the same is hereby dismissed as to each of said Petitioners, and the relief sought by said Petitioners in the aforesaid Petition for Review is denied, and said Petitioners' objections to the aforementioned Order of the Referee, dated September 23, 1957, are, and each of them is, overruled.

That the Petition for Review of the aforementioned Order of the Referee, dated September 23, 1957, filed on behalf of Millie Sterett, be, and the same is hereby dismissed, and the relief sought by said Petitioner in the aforesaid Petition for Review is denied, and the said Petitioner's objections to the aforementioned Referee's Order, dated Sep-

tember 23, 1957, are, and each of them is, overruled; provided, however, that the Respondent, Rosehedge Corporation, shall deposit in that certain escrow hereinafter mentioned, and prior to the close thereof, a full Release of Chattel Mortgage of that certain Chattel Mortgage, dated May 24, 1955, and executed by Alexander Bisno, a married man, and Louis Rubin, a married man, general partners, doing business as Moulin Rouge, a partnership, as Mortgagors, to Rosehedge Corporation, a California corporation, as Mortgagee, and recorded as Document No. 47539, [157] in Book 56, Official Records, in the office of the County Recorder of Clark County, Nevada, and upon the close of said escrow, said Release of Chattel Mortgage shall be delivered to Petitioner, Millie Sterett. Such Release of Chattel Mortgage shall be without prejudice to the rights and claims of Rosehedge Corporation to interpose or assert any and all claims and defenses, except the claim of priority, to the validity and efficacy of the Chattel Mortgage dated July 5, 1955, and executed by Moulin Rouge, A Limited Partnership, Louis Rubin and Alexander Bisno, General Partners thereof, as Mortgagors, to Millie Sterett, as Mortgagee, and recorded July 13, 1955, as Document No. 51829, in Book 61, Official Records, and filed in File 19 in the office of the County Recorder of Clark County, Nevada.

IV.

That the Petition for Review of the aforementioned Order of the Referee, dated September 23,

1957, filed by Jack Silverman, be, and the same is hereby dismissed, and the relief sought by said Petitioner in the aforesaid Petition for Review is denied, and said Petitioner's objections to the aforementioned Order of the Referee, dated September 23, 1957, are, and each of them is, overruled.

V.

That the Petition for Review of the aforementioned Order of the Referee, dated September 23, 1957, filed by Lawrence Hawthorne, be, and the same is hereby dismissed, and the relief sought by said Petitioner in the aforesaid Petition for Review is denied, and said Petitioner's objections to the aforesaid Order of the Referee, dated September 23, 1957, are, and each of them is, overruled.

VI.

That the Petition for Review, as amended, of the aforementioned Order of the Referee, dated September 23, 1957, filed by the District Director of Internal Revenue, for the District of Nevada, be, and the same is hereby dismissed, and the relief sought by said Petitioner in the aforesaid Petition for Review, as amended, is denied, and the Petitioner's objections to the aforementioned Order of the Referee, dated September 23, 1957, are, and each of [158] them is, overruled, except as otherwise provided in Paragraph I hereof.

VII.

That the purchase price of \$116,000.00, and the

additional sum of \$1500.00, shall be paid by Purchaser, S. Kohn, to the Trustee, Harry E. Miller, through and upon the close of that certain escrow now pending between S. Kohn, as Purchaser, and Harry E. Miller, Trustee, at the Pioneer Title Insurance Company, Las Vegas, Nevada, being Escrow No. LV50976-F; that immediately upon the deposit of the aforesaid sums of \$116,000.00 and \$1500.00 into the aforementioned escrow by Purchaser, S. Kohn, full possession of the said real and personal property described and referred to in the aforementioned Order of the Referee, dated September 23, 1957, shall be delivered by Harry E. Miller, Trustee, to Purchaser, S. Kohn, or nominee, who thereupon shall be entitled to the use thereof and the benefits therefrom, and after the delivery of possession, as aforesaid, LeRoy Investment Co., Inc. and Rosehedge Corporation and the Purchaser shall be responsible and liable for all costs and expenses of preservation of said real and personal property, and shall hold the Trustee, Harry E. Miller, harmless therefrom; that the aforesaid escrow shall not close, or be closed prior to the time this Order shall become final, and the moneys deposited therein by the Purchaser, or any part thereof, shall not be disbursed to the Seller, Harry E. Miller, Trustee, at any time prior to the close of said escrow; that in the event the aforesaid escrow cannot close and the real property described in the Order of the Referee, dated September 23, 1957, cannot be delivered to the Purchaser, S. Kohn, or nominee, free and clear of all taxes,

liens and encumbrances, except as otherwise herein provided, and as otherwise provided in the Order of the Referee, dated September 23, 1957, as modified herein, and a policy of Title Insurance upon said real property cannot be so written by Pioneer Title Insurance Company and delivered to Purchaser, then the aforesaid sums of \$116,000.00 and \$1500.00, deposited in the aforesaid escrow by S. Kohn, Purchaser, as aforesaid, shall be returned to said Purchaser, and the said real and personal property, subject to reasonable use, wear and tear, and subject further to the exercise of the superior claims and rights of Conditional Sales Contract [159] Sellers and Chattel Mortgagees, shall forthwith be returned and delivered to the Trustee herein, and the Release of Chattel Mortgage shall be returned to Rosehedge Corporation.

/s/ JOHN R. ROSS,
United States District
Judge. [160]

[Endorsed]: Filed November 7, 1957.

[Title of District Court and Causes.]

NOTICE OF APPEAL

Notice Is Hereby Given that Rosehedge Corporation hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain portion hereinafter set forth of that certain Order Confirming, Affirming, and Approving Referee's Order dated September 23, 1957, as modified by the

Court, and signed and filed November 7, 1957, and entered on November 9, 1957.

Said portion of the aforesaid Order from which Rosehedge Corporation appeals, as aforesaid, is that portion of Paragraph III thereof reading as follows: [166]

“* * * provided, however, that the Respondent, Rosehedge Corporation, shall deposit in that certain escrow hereinafter mentioned, and prior to the close thereof, a full Release of Chattel Mortgage of that certain Chattel Mortgage, dated May 24, 1955, and executed by Alexander Bisno, a married man, and Louis Rubin, a married man, general partners, doing business as Moulin Rouge, a partnership, as Mortgagors, to Rosehedge Corporation, a California corporation, as Mortgagee, and recorded as Document No. 47539, in Book 56, Official Records, in the office of the County Recorder of Clark County, Nevada, and upon the close of said escrow, said Release of Chattel Mortgage shall be delivered to Petitioner, Millie Sterett. Such Release of Chattel Mortgage shall be without prejudice to the rights and claims of Rosehedge Corporation to interpose or assert any and all claims and defenses, except the claim of priority, to the validity and efficacy of the Chattel Mortgage dated July 5, 1955, and executed by Moulin Rouge, a Limited Partnership, Louis Rubin and Alexander Bisno, General Partners thereof, as Mortgagors, to Millie Sterett, as Mortgagee, and recorded July 13, 1955, as Document No. 51829, in Book 61, Official Records, and

filed in File 19 in the office of the County Recorder of Clark County, Nevada.”

Rosehedge Corporation does not appeal from any other part or portion of the aforesaid Order, except as hereinbefore specifically set forth. [167]

The names and addresses of appellant's attorneys are: William G. Ruymann, 219 Fremont Street, Las Vegas, Nevada. Charles J. Katz and Samuel W. Blum, 325 West Eighth Street, 707 Union Bank Building, Los Angeles 14, California.

Dated: December 11, 1957.

WILLIAM G. RUYMANN,
CHARLES J. KATZ,
SAMUEL W. BLUM,

/s/ By SAMUEL W. BLUM,

Attorneys for Appellant, Rose-
hedge Corporation. [168]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 12, 1957.

[Title of District Court and Causes.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men by These Presents, That St. Paul Fire and Marine Insurance Company, a corporation duly organized and existing under the laws of the State of Minnesota and duly licensed to transact business as Surety in the State of Nevada is

held and firmly bound unto Millie Street in the penal sum of Two Hundred Fifty and No/100ths (\$250.00) Dollars to be paid to the said Millie Sterett, or her duly authorized legal representative, for the payment whereof, well and truly, to be made the St. Paul Fire and Marine Insurance Company binds itself, its successors and assigns, firmly by these presents.

The condition of the above obligation is such, that

Whereas, Rosehedge Corporation has appealed, or is about to appeal, to the United States Court of Appeals for the Ninth Circuit from a portion of that certain Order duly made and entered in the above entitled Court, all as more specifically set out in that certain Notice of Appeal dated December 11, 1957, [169] and filed December 12, 1957.

Now, Therefore, If Rosehedge Corporation, as appellant aforesaid, shall prosecute said appeal to effect and answer all costs which may be adjudged against it if the appeal be dismissed, or such costs as the Appellate Court may award if the order be modified, then this obligation shall be void; otherwise, to remain in full force and effect.

It Is Hereby Agreed by the Surety, that in case of default or contumacy on the part of the Appellant or Surety, the Court may, upon notice to them of not less than ten (10) days proceed summarily and render judgment against them, or either of them, in accordance with their obligation, and award execution thereon.

Signed, Sealed and Dated this 16th day of December, 1957.

[Seal] ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,

/s/ By C. E. TELANDER,
Attorney-in-Fact.

Acknowledgment of Attorney-in-Fact

State of California,
County of Los Angeles—ss.

On this 16th day of December, 1957, before me, a Notary Public, within and for the said County and State, personally appeared C. E. Telander, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of and for the St. Paul Fire and Marine Insurance Company, Saint Paul, Minnesota, a corporation created, organized and existing under and by virtue of the laws of the State of Minnesota, and acknowledged to me that he subscribed the name of the St. Paul Fire and Marine Insurance Company thereto as Surety, and his own name as Attorney-in-Fact.

[Seal] /s/ MARJORIE A. HUDSON,
Notary Public. My Commission
Expires 4-29-59.

[Endorsed]: Filed December 26, 1957.

[Title of District Court and Causes.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL IN CONNECTION WITH
THE APPEAL OF ROSEHEDGE COR-
PORATION

To the Clerk of the Above Entitled Court:

Pursuant to Rule 75a of the Federal Rules of Civil Procedure, appellant Rosehedge Corporation hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit taken by Notice of Appeal filed by Rosehedge Corporation on December 12, 1957 from a certain portion of that certain "Order Confirming, Affirming and Approving Referee's Order dated September 23, 1957, As Modified [171] by the Court", and signed and filed November 7, 1957, and entered on November 9, 1957, the following portions of the records, pleadings and evidence in this action.

1. Order Confirming, Affirming and Approving Referee's Order dated September 23, 1957, as Modified by the Court, and signed and filed on November 7, 1957, and entered on November 9, 1957.

2. Petition for Review of Referee's Order Confirming Sale of Property Free and Clear of Liens Excepting Certain Specified Liens dated September 23, 1957 filed by or on behalf of Millie Sterrett.

3. Referee's Order Confirming Sale of Property Free and Clear of Liens, excepting Certain Speci-

fied Liens Dated September 23, 1957 and signed by John C. Mowbray, Referee in Bankruptcy.

4. The written bid of S. Kohn filed with the Referee in Bankruptcy, Honorable John C. Mowbray, on September 6, 1957.

5. Notice of Appeal filed by Rosehedge Corporation on December 12, 1957.

6. The following parts and portions of Referee's Certificate on Petitions filed by Alexander Bisno (and Alexander Bisno on behalf of Millie Sterrett and Bernice Gurewitz), and by Jack Silverman for Review of Referee's Order Dated September 23, 1957:

(a) That portion contained from page 1 line 22 to and including page 2 line 6, thereof, ending with the figures "1957".

(b) That portion contained on page 2 thereof, commencing on line 9 to and including page 3 line 2 thereof.

(c) That portion of page 3, lines 15 to 29 inclusive, ending with the word "full".

(d) That portion thereof commencing on page 4, [172] line 1 thereof, to and including page 10, line 17 thereof, and ending with the word "interest".

(e) That portion thereof commencing on page 10, line 19 thereof, to and including page 10a, line 24 thereof.

(f) That portion thereof on page 23, lines 24 and 25 inclusive.

(g) That portion thereof on page 24, lines 19 to 22 inclusive, ending with the figure "1956".

(h) That portion thereof on page 24, commencing with line 19 to and including page 27, line 12 thereof.

(i) That portion thereof on page 27, lines 23 to 29 inclusive.

(j) That portion thereof on page 28, lines 1 to 8 inclusive.

(k) That portion thereof on page 28, lines 19 to 29 inclusive, ending with the word "Referee".

(l) That portion thereof on page 29 commencing with the words "the said sale" on line 2, to and including line 8.

(m) That portion of page 30, lines 1 to 10 inclusive.

(n) That portion of page 30, lines 19 to 31 inclusive, ending with the word "Court".

(o) That portion of page 31, line 17, commencing with the words "After some discussion" to and including page 37, line 20, ending with the word "Kohn".

(p) That portion thereof on page 37 commencing on line 24, to and including line 8, page 38, ending with the word "Sale".

(q) That portion thereof commencing on page 38, line 13, to page 39, line 25. [173]

(r) That portion thereof on page 40, line 20, to and including page 41, line 18 thereof.

(s) That portion thereof on page 43, lines 15 to 19 inclusive, ending with the word "same".

(t) That portion of page 43 commencing on line 20 with the words "The net", to and including page 44, line 6.

(u) That portion thereof commencing on page 44, line 13, to and including page 45, line 28 thereof.

(v) That portion thereof on page 46, lines 1 to 23 inclusive.

(w) That portion thereof on page 47, lines 25 to 27 inclusive.

7. The following portions of Referee's Certificate on Petition filed by Alexander Bisno (on behalf of Millie Sterrett and Bernice Gurewitz) and by Lawrence Hawthorne and Jack Silverman for Review of Referee's Order dated September 6, 1957:

(a) Page 1 thereof, lines 24 to page 2, line 2 thereof, ending with the figures "1957".

(b) That portion thereof on page 2, lines 9 to 26 inclusive.

(c) That portion thereof on page 24, line 12, to page 25, line 15 inclusive.

8. Order of September 6, 1957, which provides, among other things, (1) Granting Motion of LeRoy Investment Co., Inc., et al.; (2) Overruling and denying objections of Trustee, etc.; (3) Upholding validity of the pledges and the liens thereof, etc.; (4) Upholding the validity and lien of the pledged property, etc.

9. Undertaking for Costs on Appeal.
10. Statement of Points on Appeal.
11. This Designation of Contents of Record on Appeal, etc. [174]
12. Referee's Order of July 6, 1956.
13. Petition for Review of Referee's Order dated September 6, 1957 filed by, or on behalf of Millie Sterrett, which has been incorporated by reference in Petition for Review of Referee's Order dated September 23, 1957.

Dated: January 15, 1958.

WILLIAM G. RUYMANN,
CHARLES J. KATZ,
SAMUEL W. BLUM,
/s/ By SAMUEL W. BLUM,
Attorneys for Appellant Rose-
hedge Corporation. [175]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 16, 1958.

[Title of District Court and Causes.]

STATEMENT OF POINTS ON APPEAL IN
THE APPEAL BY ROSEHEDGE COR-
PORATION

The Appellant, Rosehedge Corporation, herewith presents the points upon which it intends to rely, and upon which it claims that the Honorable District Court erred in rendering that certain portion of the Order entitled "Order Confirming, Affirm-

ing, and Approving Referee's Order dated September 23, 1957, as Modified by Court", and dated and filed November 7, 1957, from which portion Rosehedge Corporation has appealed to the United States Court of Appeal for the Ninth Circuit. Said portion from [176] which said appeal has been taken is specified and set forth in the Notice of Appeal filed by Rosehedge Corporation on November 12, 1957, reference to which Notice is hereby made for further particulars. Said points upon which Rosehedge intends to rely are as follows:

1. The Honorable District Court erred in making and rendering that certain portion of that certain Order dated November 7, 1957 entitled "Order Confirming, Affirming and Approving Referee's Order dated September 23, 1957, as Modified by the Court," contained in paragraph III thereof, wherein the Court, among other things, ordered that Rosehedge Corporation shall deposit in the escrow referred to and mentioned in said Order, and prior to the close thereof, a full release of chattel mortgage of that certain Chattel Mortgage, dated May 24, 1955, and executed by Alexander Bisno, a married man, and Louis Rubin, a married man, general partners, doing business as Moulin Rouge, a partnership, as Mortgagors, to Rosehedge Corporation, a California corporation, as Mortgagee, and recorded as Document No. 47539, in Book 56, Official Records, in the office of the County Recorder of Clark County, Nevada, and upon the close of said escrow, said Release of Chattel Mortgage shall be delivered to Petitioner, Millie Sterett.

2. The Honorable District Court erred in making and rendering that certain portion of that certain Order dated November 7, 1957, and hereinbefore more particularly specified, contained in paragraph III thereof, wherein the Court ordered that Rosehedge Corporation shall deposit in the certain escrow mentioned and referred to in the said Order, and prior to the close thereof, a full release of Chattel Mortgage of that certain Chattel Mortgage, hereinbefore more particularly specified, and set forth under point 1 hereof, and directing that said full release of Chattel Mortgage be delivered to Millie Sterrett at the close of escrow, as a condition to the dismissal of the Petition for Review [177] of the Order of the Referee dated September 23, 1957, filed on behalf of Millie Sterrett, and to the denial of the relief sought thereby.

3. The Honorable District Court erred in holding and ruling that Millie Sterrett was a person aggrieved by the Referee's Order dated September 23, 1957.

4. The Honorable District Court erred in holding and ruling that the sale of the personal property by the Referee on September 6, 1957, and confirmed by the Order dated September 23, 1957, was not a sale of said property subject to the chattel mortgage of Millie Sterrett, but rather that said sale extinguished the prior chattel mortgage held by Rosehedge Corporation upon said property.

5. The Honorable District Court erred in rendering and making that portion of the Order of November 7, 1957 from which Rosehedge Corpora-

tion has appealed, in that said portion of the Order is unsupported by the evidence.

6. The Honorable District Court erred in rendering and making that portion of the Order of November 7, 1957 from which Rosehedge Corporation has appealed, in that said portion of the Order is contrary to the evidence in this proceeding.

7. The Honorable District Court erred in rendering that portion of the Order of November 7, 1957, hereinbefore more particularly set forth, from which appellant Rosehedge Corporation has appealed, in that said portion of the Order was made and rendered by the Honorable District Court without due process of law, in that no hearing was had, or evidence presented upon the question of whether or not the Chattel Mortgage held by Rosehedge Corporation was extinguished by the sale of the personal property to S. Kohn, as provided by Referee's Order dated September 23, 1957.

8. The Honorable District Court erred in rendering and making that certain portion of the Order of November 7, 1957 from [178] which Rosehedge Corporation has appealed, and hereinbefore more particularly set forth, in that the Petition on Review filed by or on behalf of Millie Sterrett from Referee's Order dated September 23, 1957 does not contain or specify any grounds of review or specification of error relating to or concerning the extinguishment of the Chattel Mortgage held by Rosehedge Corporation upon the personal property by reason of the sale of said personal property to S. Kohn by the Referee on September 6, 1957, and

confirmed by Referee's Order dated September 23, 1957.

9. That the Honorable District Court erred in rendering and making that portion of the Order of November 7, 1957 from which Rosehedge Corporation has appealed, as hereinbefore more particularly set forth, in that in making and rendering that portion of said Order, the Honorable District Court exceeded its jurisdiction in the matter.

10. The Honorable District Court erred in rendering and making that portion of the Order of November 7, 1957, hereinbefore more particularly set forth, and from which Rosehedge Corporation has appealed, in that said Honorable District Court should have dismissed the Petition for Review filed by, or on behalf of Millie Sterrett from Referee's Order of September 23, 1957, because of the insufficiency of such Petition for Review, both in form or contents.

Dated: January 15, 1958.

Respectfully submitted,

WILLIAM G. RUYMANN,
CHARLES J. KATZ,
SAMUEL W. BLUM,

/s/ By SAMUEL W. BLUM,

Attorneys for Appellant, Rose-
hedge Corporation. [179]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 16, 1958.

[Title of District Court and Causes.]

APPELLEE MILLIE STERETT'S DESIGN-
NATION OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, appellee Millie Sterett hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit taken by Notice of Appeal filed by Rosehedge Corporation on December 12, 1957 from a certain portion of that certain "Order Confirming, Affirming and Approving Referee's Order dated September 23, 1957, as Modified by the court", and signed and filed November 7, 1957, and entered on November 9, 1957, the following portions of the records, pleadings and evidence in this action.

1. Proof of Claim of Millie Sterett filed in the above entitled bankruptcy.

2. Copy of promissory note attached as an exhibit to said Proof of Claim.

3. Certified copy of Mortgage of Chattels attached as an exhibit to said Proof of Claim.

4. The following portions of Referee's Certificate on Petition filed by appellee and others for review of Referee's Order dated September 6, 1957:

a. That portion commencing on page 36, line 27 to and including page 40, line 25, ending with the word "trust".

5. The following portions of Referee's Certificate on Petition filed by appellee and others for review of Referee's Order dated September 23, 1957.

a. That portion commencing on page 10, line 25 to and including page 11, line 11, ending with the figures "1656".

b. That portion commencing on Page 13, Line 1 to and including Page 13, line 13, ending with the word "bidders".

6. Stipulation dated June 19, 1956 between the trustee in bankruptcy, LeRoy Investment Company, Inc. and Rosehedge Corporation, which stipulation was approved by the Referee.

7. Order for Sale of Property and Order authorizing Sale of Property Free and Clear of Liens dated July 6, 1956.

8. The following portions of appellee's Memorandum of Law in Support of Petition for Review of Referee's Order dated September 23, 1957:

a. That portion commencing on page 1, line 19 to and including page 1, line 24, ending with the word "bankrupt".

b. That portion commencing on page 6, line 8 to and including page 8, line 9, ending with the word "just".

9. Joinder of Millie Sterett in Petitions for Review.

Dated: January 24, 1958.

ARTHUR N. GREENBERG and
ROBERT COHEN,

/s/ By ARTHUR N. GREENBERG,
Attorneys for Appellee Millie
Sterett.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 28, 1958.

[Title of District Court and Causes.]

CERTIFICATE OF CLERK

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents and exhibits, listed in the attached Index, are the originals filed in this court, or true and correct copies of orders entered on the minutes or dockets of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 18th day of February, 1958.

[Seal] OLIVER F. PRATT,
Clerk,

/s/ By RAY MONA SMITH,
Deputy. [180]

[Endorsed]: No. 15915. United States Court of Appeals for the Ninth Circuit. Rosehedge Corporation, Appellant, vs. Millie Sterrett, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: February 19, 1958.

Docketed: March 5, 1958.

Supplemental Filed: March 11, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15915

ROSEHEDGE CORPORATION, a corporation,
Appellant,

vs.

MILLIE STERETT, Appellee.

STATEMENT OF POINTS ON APPEAL RE-
LIED UPON BY ROSEHEDGE CORPORA-
TION

To the Clerk of the Above Entitled Court:

The Appellant, Rosehedge Corporation, herewith adopts as its Statement of Points on Appeal that certain Statement entitled "Statement of Points on Appeal in the Appeal by Rosehedge Corpora-

tion'' now appearing in the typewritten record of this appeal, and makes the same as part of the record on this appeal as the Statement of Points on Appeal relied upon by Appellant Rosehedge Corporation by this reference, the same as though set forth herein in full.

Dated: March 25, 1958.

Respectfully submitted,

CHARLES J. KATZ,
SAMUEL W. BLUM,
WILLIAM G. RUYMANN,

/s/ By SAMUEL W. BLUM,
Attorneys for Appellant,
Rosehedge Corporation.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 27, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD,
BY APPELLANT ROSEHEDGE COR-
PORATION, MATERIAL TO THE CON-
SIDERATION OF ITS APPEAL

To the Clerk of the Above Entitled Court:

The Appellant, Rosehedge Corporation, does hereby adopt, as its Designation of the Record, Material to the Consideration of its Appeal, that certain Designation entitled "Designation of Contents of Record on Appeal In Connection With

The Appeal of Rosehedge Corporation" now appearing in the typewritten record of this appeal and makes the same a part of the record on this appeal as the Designation of Contents of Record on Appeal by Appellant Rosehedge Corporation by this reference the same as though set forth herein in full.

Dated: March 25, 1958.

Respectfully submitted,

CHARLES J. KATZ,
SAMUEL W. BLUM,
WILLIAM G. RUYMANN,

/s/ By SAMUEL W. BLUM,
Attorneys for Appellant,
Rosehedge Corporation.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 27, 1958. Paul P. O'Brien, Clerk.

No. 15915
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of the Properties

MOULIN ROUGE, INC., a corporation and successor in interest to
MOULIN ROUGE, a limited partnership,

Bankrupt.

In the Matter of

MOULIN ROUGE, a Limited Partnership,

Bankrupt.

ROSEHEDGE CORPORATION, a corporation,

Appellant,

vs.

MILLIE STERETT,

Appellee.

APPELLANT'S OPENING BRIEF.

CHARLES J. KATZ,
SAMUEL W. BLUM,
707 Union Bank Building,
325 West 8th Street,
Los Angeles 14, California,
and

WILLIAM G. RUYMANN,
219 Fremont Street,
Las Vegas, Nevada,
Attorneys for Appellant.

FILED

NOV 13 1958

PAUL E. HENRY, Clerk

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No. 15915

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Properties

MOULIN ROUGE, INC., a corporation and successor in interest to
MOULIN ROUGE, a limited partnership,
Bankrupt.

In the Matter of

MOULIN ROUGE, a Limited Partnership,
Bankrupt.

ROSEHEDGE CORPORATION, a corporation,
Appellant,
vs.
MILLIE STERETT,
Appellee.

APPELLANT'S OPENING BRIEF.

Introductory Statement.

Rosehedge Corporation, a secured creditor, appeals from that portion of Paragraph III of that Order Confirming, Affirming and Approving Referee's Order Dated September 23, 1957, as Modified by the Court of the United States District Court for the District of Nevada rendered on Review by the Honorable John R. Ross, District Judge, and reading as follows:

"* * * provided, however, that the Respondent, Rosehedge Corporation, shall deposit in that certain escrow hereinafter mentioned, and prior to the close thereof, a full Release of Chattel Mortgage of that certain Chattel Mortgage dated May 24, 1955, and executed by Alexander Bisno, a married man, and Louis Rubin, a married man, general partners, doing business as Moulin Rouge, a partnership, as Mortgagors, to Rosehedge Corporation, a California corporation, as Mort-

gagee, and recorded as Document No. 47539, in Book 56, Official Records, in the office of the County Recorder of Clark County, Nevada, and upon the close of said escrow, said Release of Chattel Mortgage shall be delivered to Petitioner, Millie Sterett. Such Release of Chattel Mortgage shall be without prejudice to the rights and claims of Rosehedge Corporation to interpose or assert any and all claims and defenses, except the claim of priority, to the validity and efficacy of the Chattel Mortgage dated July 5, 1955, and executed by Moulin Rouge, a Limited Partnership, Louis Rubin and Alexander Bisno, General Partners thereof, as Mortgagors, to Millie Sterett, as Mortgagee, and recorded July 13, 1955, as Document No. 51829, in Book 61, Official Records, and filed in File 19 in the office of the County Recorder of Clark County, Nevada" [R. 139-141].¹

The Referee's Order Confirming Sale of Property Free and Clear of Liens, Excepting Certain Specified Liens Dated September 23, 1957, confirmed a sale made in open Court by the Referee on September 6, 1957, to one S. Kohn for \$116,000.00 cash, and other payments. Said Order confirmed the sale of certain real property, free and clear of all taxes, liens and encumbrances, *excepting only*: (1) certain State, County and City taxes; (2) an assessment; (3) deed of trust executed by Edna Shulman, securing her \$600,000.00 promissory note to Bisno & Bisno, Inc.; (4) assignment of said deed of trust by Bisno & Bisno, Inc., to Alexander Bisno and Louis Rubin; (5) assignment and pledge of the Shulman note and deed of trust by Bisno and Rubin to LeRoy Investment Co., Inc., to secure payment of their \$250,000.00 promissory note; and (6) *assignment and pledge of the Shulman note and*

¹The Rosehedge Chattel Mortgage was recorded May 25, 1955 [R. 10-11, par. 11].

deed of trust by Bisno and Rubin to Rosehedge Corporation (subject to prior LeRoy assignment and pledge) to secure payment of a \$195,000.00 promissory note by Moulin Rouge, a partnership, to Rosehedge Corporation. Referee's Order also confirmed the sale of Trustee's interest in furniture, furnishings, gaming equipment, and all other tangible personal property pertaining to the business of Moulin Rouge, "*subject, . . . to all valid and subsisting . . . chattel mortgages against the said personal property*" [R. 66-75].

The real property was purchased and sold subject to approximately \$52,000.00 in taxes [R. 115]; the Leroy lien claim of \$272,722.50 [R. 37-40]; the Rosehedge lien claim of \$154,846.65 [R. 40-43]; and the Shulman note and trust deed of lien indebtedness of \$427,569.15 [R. 41].

Trustee's interest in the personal property was purchased and sold "subject to all valid and subsisting . . . chattel mortgages." This includes a chattel mortgage held by Rosehedge Corporation, as additional security for its \$195,000.00 promissory note, and the subsequent chattel mortgage held by Millie Sterett [R. 10-11, lines 11 and 13].

Several Reviews, including one by Alexander Bisno, for himself and on behalf of Millie Sterett [R. 75-81] were taken from the aforesaid Referee's Order. The District Judge's Order modified the Referee's Order pertaining to taxes (not involved upon this appeal [R. 133-134]; and as modified, affirmed the Referee's Order in all respects; it *expressly adjudged* that the sale of the real property to S. Kohn was a sale free and clear of all taxes, liens and encumbrances, *excepting only* taxes, as modified, and the various liens and lien claims as set forth in subparagraphs (2), (3), (4), (5) and (6) of the Referee's Order [R. 134-135]; (*subparagraph (6) is the lien and lien claim of Rosehedge Corporation*); it also dismissed the several Petitions for Review, and denied the relief sought

by the various Petitioners, except as otherwise provided in the Judge's Order [R. 135-137]; and provided for the payment of the increased purchase price through an escrow [R. 137-138]. The said Order, however, *further ordered Rosehedge Corporation to deposit in escrow, a full release of its chattel mortgage, for delivery to Millie Sterett, at the close thereof* [R. 136].

Rosehedge Corporation is aggrieved by this latter portion of said Order. It deprives it of the right to assert its superiority and priority, both in time and recordation, over the Sterett chattel mortgage. It permits Rosehedge to challenge the Sterett chattel mortgage solely for invalidity, or want of efficacy, other than the priority of its chattel mortgage over the Sterett chattel mortgage [R. 136].

This portion of the Judge's Order is based upon a claim first asserted by Sterett in her "Memorandum of Law" served and filed *at the hearing* upon Review—that the Rosehedge lien claim and chattel mortgage had been satisfied and extinguished by the bid of, and sale to S. Kohn, who made the bid in her name, but on behalf of LeRoy Investment Co., Inc., and Rosehedge Corporation. Yet the S. Kohn bid, *as made, expressly stated* [R. 31] that she offered to purchase the real property *subject, among others, to the Rosehedge lien and lien indebtedness*, and the Trustee's interest in the personal property "*subject to all valid chattel mortgages*" [R. 31]; the Referee's Order *expressly so confirmed* the sale [R. 72], and the District Judge's Order on Review *expressly confirmed, affirmed and approved the sale, as made* [R. 135]. The Sterett Petition for Review sets forth no grounds for review, or specification of error asserting the Referee's Order is erroneous because the Rosehedge indebtedness and its chattel mortgage was satisfied and extinguished by the bid of and sale to S. Kohn, or otherwise [R. 75-81]. No such question was presented for review by the Referee in his Certificate under "The Questions Presented" [R. 123].

No such issue was ever presented to, or raised before the Referee. No such finding or determination was ever made by the Referee. The "Memorandum of Law" cannot enlarge the scope of, or the grounds stated in, or the issues presented by the Petition for Review.

No further evidence was presented or introduced upon Review, before the District Judge, either to support such argument, or to sustain the challenged portion of the District Judge's Order. Until Alexander Bisno, for himself and on the behalf of Millie Sterett filed Petitions for Review from Referee's Orders of September 6, 1957, and September 23, 1957, respectively, Millie Sterett never appeared at, or participated in any hearing, meeting, proceeding or sale in these bankruptcy proceedings, except to file a claim; nor did she ever seek leave to foreclose her chattel mortgage, or file any petition for reclamation in these bankruptcy proceedings [R. 83]. Millie Sterett was *not* present, or represented at the sale. No bid was made, or objection interposed, on her behalf to the bid of, or sale to S. Kohn, at said sale, or thereafter, or to its confirmation at any time prior to September 23, 1957, when the Referee signed and filed his Order Confirming Sale. She has never made any showing that a better or higher bid could have been obtained [R. 82-84, 118-120, 131-132]. The Referee's Order expressly protects whatever rights she had, or has, as a chattel mortgagee lien claimant, since the personal property was sold to S. Kohn "*subject to all valid . . . chattel mortgages against said personal property*" [R. 73, 83, 119]. Millie Sterett was not a "person aggrieved" by such Order, and had no right of review therefrom [R. 120].

The present appeal relates solely to, and affects only the portion of the Order from which Appellant Rosehedge Corporation has appealed. Rosehedge Corporation is the Appellant, and Millie Sterett is the Appellee on this appeal.

Statement of Jurisdiction.

1. The statutory provisions believed to sustain the jurisdiction of the District Court are as follows: U.S.C.A., Title 11, Section 1, subdivision 10, providing that “. . . courts of bankruptcy shall include the District Courts of the United States. . . .” (Bankruptcy Act, Sec. 1, sub. 10);² U.S.C.A., Title 11, Section 11, subdivision (a), providing

“The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title. . . .” (Bankruptcy Act, Sec. 2);

U.S.C.A., Title 11, Chapter 11, Sections 701 to 799, entitled, and providing for “Arrangements,” meaning “. . . any plan of a debtor for the settlement, satisfaction, or extension of time of payment of his unsecured debts upon any terms; . . .” (Bankruptcy Act, Ch. XI, Secs. 301 to 399); U.S.C.A., Title 11, Section 110(f) “. . . real and personal property shall, when practicable, be sold subject to the approval of the Court . . .” (g) “The title to property of a bankrupt estate which has been sold shall be conveyed to the purchaser by the Trustee.” (Bankruptcy Act, Sec. 70(f) and (g)); U.S.C.A., Title 11, Section 66, “Referees are hereby invested, subject always to a review by the judge, with jurisdiction to . . . (6) perform such of the duties as are by this title conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, as prescribed by rules or orders of the courts of bankruptcy of their respective districts . . .”

²All references to the Bankruptcy Act refer to the Chandler Act, as amended.

(Bankruptcy Act, Sec. 38(6)); U.S.C.A., Title 11, Section 67(c), "A person aggrieved by an order of a referee may . . . file with the Referee a petition for review of such order by a judge . . ." (Bankruptcy Act, Sec. 39(c)).

2. The existence of jurisdiction of the District Court is shown by the following pleadings:

(a) Proceedings for Plan of Arrangement filed October 19, 1955, by Properties Moulin Rouge, Inc., a Nevada corporation, in the District Court of the United States for the District of Nevada, entitled "In the Matter of Properties Moulin Rouge, Inc., a corporation, and successor in interest to Moulin Rouge, a limited partnership, Debtor," No. 921 (new No. 55) [R. 91].

(b) Proceeding for Plan of Arrangement filed November 23, 1955, by Moulin Rouge, a Limited Partnership, in the District Court of the United States for the District of Nevada, entitled "In the Matter of Moulin Rouge, a Limited Partnership, Debtor," No. 925 (new No. 59) [R. 91].

(c) Order of reference whereby the aforementioned proceedings were referred to Referee John C. Mowbray [R. 89].

(d) Referee's Order on March 15, 1956, adjudicating Properties Moulin Rouge, a corporation, a bankrupt [R. 93].

(e) Referee's Order on April 12, 1956, adjudicating Moulin Rouge, a Limited Partnership, a bankrupt [R. 93].

(f) Petition of Trustee, filed May 21, 1956, to Sell Free and Clear of Liens, the property belonging to bankrupt estates, and Supplemental Petition thereto filed June 5, 1956 [R. 97-98].

(g) Petition of Trustee for Authority to Sell Property belonging to said estates, in accordance with the Bankruptcy Act [R. 98].

(h) Notice of Hearing on Petitions to Sell Real Property issued on June 5, 1956, and duly given to all creditors, attorneys, lienholders, lien claimants, and all parties in interest, setting hearing on June 18, 1956 [R. 98].

(i) Order to Show Cause Why Property Should Not Be Sold Free and Clear of Liens, filed June 5, 1956, and directed and given to all lienholders of record, and as listed in said Petition of May 21, 1956, and to creditors, and all persons in interest, setting hearing for June 18, 1956 [R. 98-99].

(j) Order for Sale of Property, and Order Authorizing Sale of Property Free and Clear of Liens, which authorized Trustee to sell, in accordance with the Bankruptcy Act, certain real property of the bankrupt estates, including all furniture, fixtures and other personal property contained therein "*upon such terms and conditions as the Court shall hereafter approve.*" It also authorized Trustee to sell the same free and clear of the liens [R. 3-20, 103-105].

(k) Referee's Orders of Continuances of: Petition for Authority to Sell, the hearing thereon, the notices of hearings thereon, the notice of sale, and the sale, from time to time from June 18, 1956, finally to September 6, 1957 [R. 94, 105-110].

(l) The written bid of S. Kohn to purchase the real property, free and clear of all liens, claims and encumbrances, *except certain liens*, and Trustee's right, title and interest in and to certain enumerated personal property, *subject to all valid and subsisting conditional sales contracts and chattel mortgages against said personal property* [R. 29-39].

(m) Referee's Order Confirming Sale of Property Free and Clear of Liens Excepting Certain Specified Liens, dated September 23, 1957, confirming the sale of the real

and personal property, made in open Court, on September 6, 1957, to S. Kohn in accordance with terms of her bid [R. 66-73].

(n) Petition for Review of Referee's Order Confirming Sale of Property Free and Clear of Liens Excepting Certain Specified Liens, dated September 23, 1957, and filed on October 3, 1957, by Alexander Bisno, and on behalf of Millie Sterett [R. 75-81].

(o) The District Judge's Order Confirming, Affirming and Approving Referee's Order Dated September 23, 1957, as Modified by the Court, entered on November 9, 1957 [R. 128-139].

3. The statutory provisions believed to sustain the jurisdiction of the United States Court of Appeals for the Ninth Circuit are as follows: U.S.C.A., Title 11, Section 47, subdivision (a), providing "The Circuit Courts of Appeal of the United States . . . are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse both in matters of law and in matters of fact . . ." and subsection (b) thereof, providing "Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal." (Bankruptcy Act, Sec. 24(a) and (b)); U.S.C.A., Title 11, Section 48, subsection (a), providing "Appeals under this title to the Circuit Court of Appeals of the United States . . . shall be taken within thirty days after written notice to the aggrieved party of the entry of judgment, order or decree complained of . . . or if such notice be not served and filed, then within forty days from such entry." (Bankruptcy Act, Sec. 25a); U.S.C.A., Title 11, following Section 53, General Order 36 providing "Appeals shall be regulated, except as otherwise provided in the Act, by the

rules governing appeals in civil actions in the Courts of the United States, including the Rules of Civil Procedure for the District Courts of the United States"; U.S.C.A., Title 28, Federal Rules of Civil Procedure, Rule 73(a) "A party may appeal from a judgment by filing with the District Court a notice of appeal"; (b) "The notice of appeal . . . shall designate the judgment, *or the part thereof appealed from*, and shall name the Court to which the appeal is taken . . ." Rule 54a: "'Judgment,' as used in these Rules, include any Order from Which an appeal lies. . . ."

4. The existence of jurisdiction of the United States Court of Appeals is shown by the following:

(a) The Order of the District Court Confirming, Affirming and Approving Referee's Order Dated September 23, 1957, as Modified by the Court, entered on November 9, 1957, which, in part, orders Rosehedge Corporation to release its chattel mortgage through escrow to Millie Sterett, holder of a subsequent chattel mortgage [R. 128-129].

(b) The Notice of Appeal timely filed by Rosehedge Corporation on December 12, 1957, from a specific and designated portion of the aforesaid Order of the District Court [R. 139-141].

Statement of the Case.

A. Statement of Facts.

On July 9, 1954, Edna Shulman, for valuable consideration, executed her promissory note to Bisno & Bisno, Inc., a Nevada corporation, for \$600,000.00, with interest thereon at 6 per cent per anum from December 1, 1954. Both principal and interest were payable in installments as therein specified. This note was secured by a deed of trust, dated July 9, 1954, executed by Edna Shulman, trustor, to Pioneer Title Insurance and Trust Company,

Trustee, and Bisno & Bisno, Inc., Beneficiary, upon certain real property subsequently sold to S. Kohn. This deed of trust was recorded in Clark County, Nevada, on July 12, 1954 [R. 44-45, 95]. Subsequently this trust deed (and Shulman note) was assigned by Bisno & Bisno, Inc., to Alexander Bisno and Louis Rubin [R. 30, par. 4]. On or about April 27, 1955, Alexander Bisno and Louis Rubin executed their promissory note, to evidence a loan made to them by LeRoy Investment Co., Inc., a California corporation (hereinafter designated LeRoy) for \$250,000.00, payable on or before August 27, 1955, with interest at 11½ per cent per annum. This note was secured by an assignment and pledge agreement, and a pledge of the aforementioned Shulman note and deed of trust. This assignment and pledge agreement was recorded in Clark County, Nevada, on April 29, 1955 [R. 38-40]. On or about May 24, 1954, Moulin Rouge, a partnership, and Louis Rubin and Alexander Bisno, as partners thereof, and individually, executed their promissory note to Rosehedge Corporation, a California corporation (hereinafter designated Rosehedge) for \$195,000.00 to evidence a loan of said sum, with interest thereon at 6 per cent per annum; principal and interest were payable in weekly installments. This note was secured by an assignment and pledge agreement, and pledge (subject to the LeRoy assignment and pledge) of the aforementioned Shulman note and deed of trust, and *also* by a chattel mortgage, dated May 24, 1955, executed by Alexander Bisno and Louis Rubin, general partners doing business as Moulin Rouge, a Partnership, as mortgagors, to Rosehedge, as mortgagee, covering certain personal property located in the Moulin Rouge Hotel. Both the chattel mortgage and the aforesaid assignment and pledge agreement were recorded in Clark County, Nevada, on May 25, 1955 [R. 10-11, par. 11, 41]. On or about July 5, 1955, Moulin Rouge, a Limited Partnership, by its general partners Alexander Bisno and Louis Rubin,

as mortgagors, executed a chattel mortgage to Millie Sterett, as mortgagee, to secure a promissory note for \$35,000.00, with interest thereon at 12 per cent per annum. This chattel mortgage was recorded in Clark County, Nevada, on July 13, 1955 [R. 11-12, par. 13; 21-29; 140-141].

Thereafter various defaults occurred in the payment and performance of the Rosehedge and LeRoy promissory notes and Rosehedge and LeRoy commenced foreclosure sales of their respective pledges [R. 89-92].

On October 19, 1955, Chapter XI Proceedings were filed by Properties Moulin Rouge, Inc., a corporation, and successor in interest to Moulin Rouge, a Limited Partnership, in the United States District Court for the District of Nevada. On October 27, 1955, after notice, the Referee enjoined the foreclosure proceedings and sales of LeRoy and Rosehedge. This Order remained in effect until September 6, 1957.

On November 23, 1955, Moulin Rouge, a Limited Partnership, filed Chapter XI proceedings in the United States District Court for the District of Nevada. Harry E. Miller was appointed Receiver, in each of the Chapter XI proceedings, and after adjudications, was elected Trustee in each proceeding. On January 17, 1956, Rosehedge and LeRoy filed their written Motion for leave to proceed with their pledge foreclosures and sales. Written objections thereto were filed by the Receiver. Said Motion and Objections were set for hearing before the Referee, and were heard on March 12, 13, April 5, 27, 28, 29, May 1, 24 and June 13 and 14, 1956, and then was submitted by the Referee for decision [R. 91-92].

On May 21, 1956, Trustee filed a Petition for authority to sell, free and clear of liens, the property belonging to the Bankrupt Estates. On June 5, 1956, he filed a Supplemental Petition thereto, and also filed a Petition for Au-

thority to Sell, in accordance with the terms of the Bankruptcy Act, the property belonging to the Bankrupt Estates. Notice of Hearings of said Petitions were duly given by mail, to all creditors, lienholders, lien claimants, attorneys, and all parties in interest [R. 98-99].

On June 18, 1956, the continued first meeting of creditors, and the hearings upon the aforementioned Petitions were held before the Referee. Several objections were interposed to said Petitions. LeRoy and Rosehedge contended that they would be seriously prejudiced by the sale of this property unless a proposed Stipulation was acceptable to Trustee's Counsel and approved by the Referee, by which a sale of the real property, free and clear of liens, could be held, pending the determination of the LeRoy and Rosehedge Motion, upon condition that LeRoy and Rosehedge could bid at any such sale, and use the amount of their respective lien claims, in whole or in part, on account of any bids made by them, and, in whole or in part, on account of the purchase price, if they became purchasers. The hearings were continued to June 19, 1956 [R. 99-102].

A satisfactory Stipulation was agreed upon, and signed and filed. It was approved by the Referee on June 19, 1956, and by reference, became a part of the subsequent July 6, 1956, Order [R. 101-102]. This Stipulation [R. 57-66] covered many matters, but pertinent portions thereof, in effect provided that pending the final determination of the aforesaid LeRoy and Rosehedge Motion, the real property could be sold by Trustee, at public sale under the supervision, and with the approval of the Court, free and clear of liens, upon condition that such sale be without prejudice to the rights and liens of Rosehedge and LeRoy; that the property be expeditiously sold; that the liens of LeRoy and Rosehedge be transferred to the proceeds of sale with the same priorities as held by their liens; that LeRoy and Rosehedge, jointly or severally, may be bidders at the sale, and entitled to use their respective

lien claims, in whole or in part, on account of bids made by them, and on account of the purchase price, if they became the purchasers [R. 57-66, 102-104].

On June 19, 1956, the first meeting of creditors, the various hearings, the notices of hearings, the notice of sale, and the sale, and each of them, was continued to July 30, 1956 [R. 105].

On July 6, 1956, the Referee signed and filed an Order for Sale of Property and Order for Sale of Property Free and Clear of Liens [R. 3-20, 105-106]. This Order (1) overruled all objections to Trustee's Petitions; (2) approved and incorporated by reference, the aforesaid Rose-hedge-LeRoy Stipulation; (3) authorized Trustee to sell the real and personal property of Bankrupts, in accordance with Bankruptcy Act "*upon such terms and conditions as the Court shall hereafter approve*"; and (4) authorized Trustee to sell the property of Bankrupts, free and clear of liens [R. 3-20].

No Reviews were taken from this Order, and it became final [R. 131]. On July 13, 1956, Millie Sterett filed a Proof of Secured Claim [R. 21-28]. It has never been approved or rejected. The Referee ordered the sale, and notice of sale, the first meeting of creditors, the further hearings upon Trustee's Petitions, and Notice of Hearing thereon, continued from time to time, to wit: from June 18, 1956, to June 19, 1956; then to July 30, 1956; then to September 10, 1956; then to November 27, 1956; then to January 25, 1957; then to February 26, 1957; then to May 23, 1957; then to July 22, 1957; and then to September 6, 1957. These continuances were ordered by Referee to permit a more advantageous sale, or the adoption of a feasible plan of arrangement, and were necessary because, either no bid, or no adequate or substantial bid, was offered or received on these dates, or to permit the completion and presentation of suggested plans of arrange-

ment, which would have resulted advantageously to general creditors, none of which, however, materialized [R. 94, 106-110]. During said period, the sale, and notice thereof, was advertised extensively, both locally and nationally, in local and nationally well-known and widely circulated newspapers, on numerous occasions, and for extended periods of time, and by brochures, prepared and sent by Trustee throughout the United States to thousands of prospective bidders and purchasers and other interested persons [R. 68].

The sale on September 6, 1957, was conducted by the Referee in open Court. It was well attended by large numbers of people, creditors and other parties in interest. Millie Sterett was neither present or represented at said sale. No bid on her behalf was made, and no objection on her behalf (or by anyone) was interposed to the bid of or sale to S. Kohn, at said sale, or thereafter, or to its confirmation, either by Sterett, or by anyone, between the date of sale and September 23, 1957, when the Referee signed and filed his Order Confirming Sale [R. 110, 118, 119, 131-132].

On September 6, 1957, during the sale conducted by Referee, a written bid by, and in the name of S. Kohn (a secretary to Mr. Katz), but on behalf of LeRoy and Rosehedge, was announced, made and submitted to the Referee, and read aloud to all persons present. The bid was then ordered filed [R. 110-112]. This written bid, as announced and made, provided that S. Kohn offered to purchase: (A) all the real property, with its improvements for \$116,000.00 cash, free and clear of all liens, claims and encumbrances, excepting the following: (1) specified State, County and City taxes; (2) a specified assessment; (3) the \$600,000.00 Shulman trust deed; (4) the assignment thereof by Bisno & Bisno, Inc., to Alexander Bisno and Louis Rubin; (5) the assignment and pledge of aforesaid trust deed by Bisno and Rubin to

LeRoy; (6) the assignment and pledge of aforesaid trust deed by Bisno and Rubin to Rosehedge; and additionally, and for the same consideration, (B) all of Trustee's right, title and interest in and to the furniture, furnishings, gaming equipment of all kinds, and other tangible personal property pertaining to the business of Moulin Rouge, *subject to all valid and subsisting additional sales contracts and chattel mortgages against the said personal property*; that the sale was to be consummated through, and the purchase price was to be paid in an escrow; that Purchaser was to obtain a policy of title insurance guaranteeing title as set forth in said bid. Said bidder also orally offered to pay costs of escrow, and title insurance policy, and to prorate the utility and insurance costs [R. 29-33, 110-112].

The Referee then requested further bids. Thereupon a recess of the sale for about one hour was requested by a prospective bidder to enable him to discuss a proposed plan of arrangement with certain lienholders to ascertain if the same would be acceptable to them. No objection thereto was interposed and the sale was recessed until 1:30 o'clock P.M. of said day [R. 112-113].

When the sale reconvened, the proposed plan, as a bid, was submitted. Various objections thereto were interposed, discussed, and analyzed; it was disclosed that such bid was not a firm bid, but was incomplete, conditional, contingent, and dependent upon too many contingencies and uncertainties; that it would require a lengthy continuance, and the consents of all lienholders, without any assurance, or hope of success, that a feasible and acceptable plan could, or would be presented at a later date [R. 112-114].

The Referee then stated to all present that for two years he had sought primarily to assist the unsecured general creditors; that during such period he had restrained

secured creditors from proceeding with foreclosures; that the Trustee had used every effort to sell the assets without avail; various plans of arrangement had been proposed, but no feasible plan had been presented; that secured creditors could not be restrained forever; that the property was depreciating; that costs and expenses were rapidly mounting; that the Trustee's Report showed that approximately \$52,000.00 of real estate taxes had accrued and were unpaid; that unpaid costs and expenses of preservation of assets incurred by Receiver and Trustee then exceeded \$70,000.00, which with taxes were accumulating in excess of \$6,000.00 per month; that costs of administration remained unpaid; that the property had been extensively advertised throughout the United States, yet no bid or offer had been received or submitted which could be accepted by the Referee; that the proposed plan was not a firm bid; it was too contingent and depended upon too many uncertainties; it required further delays and required the consent of all lienholders, which apparently was not forthcoming; that the time had come when he was compelled to stop the mounting expenses; that under the law and Bankruptcy Act, he could not delay the proceedings any longer. The Referee then rejected this bid. The bid of S. Kohn was then renewed, as previously made; the Referee asked for other bids, and there being none, the Referee then accepted the bid of S. Kohn, as made, as the highest and best bid made, and there being no objections thereto, directed Trustee's counsel to prepare and present for signature an appropriate Order confirming said sale to S. Kohn [R. 115-116].

After the sale, an escrow, as provided by the S. Kohn bid was opened, and is pending [R. 16].

Also, on September 6, 1957, the Referee rendered his decision on the LeRoy and Rosehedge Motion; he granted said Motion; overruled the Trustee's Objections thereto, upheld the validity and lien of the LeRoy and Rosehedge

pledges, and announced the amounts thereof, and upheld the validity and lien of the Shulman trust deed and validity of the Shulman note [R. 33-48, 84-88]. On said date, *after the sale*, the Referee signed and filed his Order in respect thereto. This Order [R. 33-48] among other things, provides (1) that the LeRoy and Rosehedge Motion was granted; (2) that Trustee's objections thereto were overruled; (3) that there was a total sum of \$272,-722.50 due, owing and unpaid to LeRoy upon its promissory note which was secured by the valid first pledge of the Shulman note and trust deed; (4) that there was a total sum of \$154,846.65 due, owing and unpaid to Rosehedge upon its promissory note which was secured by a valid pledge of the Shulman note and trust deed, subject to the prior LeRoy pledge; (5) that the Shulman note was valid and supported by adequate and legal consideration, without any infirmities or defenses thereto, and was secured by a valid trust deed, creating a valid first lien upon the real property described therein; and that the amount due and owing upon the Shulman note was the total amount due and owing to LeRoy and Rosehedge. Other portions of said Order provided for certain priorities; that the real property be offered for sale by the Court, and the liens of LeRoy and Rosehedge be transferred to the proceeds of sale; that if no such sale were made, LeRoy and Rosehedge then were authorized to proceed with their foreclosure sales [R. 33-48].

Several Petitions for Review, including one by Alexander Bisno, for himself and on behalf of Millie Sterett, were taken from Referee's Order, dated September 6, 1957 [R. 50-66] and were denied by the District Court. This Order has become final.

On September 23, 1957, the Order Confirming Sale of Property Free and Clear of Liens, Excepting Certain Specified Liens was signed and filed by the Referee [R. 66-75, 116]. This Order [R. 66-75] among other things,

confirmed the sale to S. Kohn for \$116,000.00 cash of the real property, free and clear of all taxes, liens and encumbrances, except only the following: (a) specified State, County and City taxes; (b) a specified assessment; (c) the \$600,000.00 Shulman trust deed; (d) assignment of aforesaid trust deed by Bisno & Bisno, Inc., to Alexander Bisno and Louis Rubin; (e) assignment and pledge of aforesaid trust deed by Bisno and Rubin to LeRoy; and (f) *assignment and pledge of aforesaid trust deed by Bisno and Rubin to Rosehedge*, together with the sale to S. Kohn of the Trustee's interest in the personal property "*subject to all valid and subsisting . . . chattel mortgages against the said personal property*" as made on September 6, 1957, and directed Trustee to execute proper instruments of conveyance of the said real and personal property, subject to the items, as aforesaid, upon the payment of the purchase price [R. 66-75].

On October 3, 1957, Alexander Bisno, for himself, and on behalf of Millie Sterett, filed a Petition for Review from the aforementioned Order Confirming Sale [R. 75-81]. This Petition set forth the following grounds of review: (1) That on July 6, 1956, the Referee authorized the sale of the real property free and clear of all liens; that the offer of and sale to S. Kohn was contrary to, and not in accordance with such Order, but was made expressly subject to the Shulman \$600,000.00 trust deed and the assignments thereof to LeRoy and Rosehedge; that notice, as required by the Bankruptcy Act was not given with reference to the sale to S. Kohn; (2) that the evidence was not sufficient to justify said Order in that (a) the Shulman note and trust deed never were valid, and that LeRoy and Rosehedge were not lawful holders, owners, pledgees or pledge holders of the same; (b) that there were prior and superior rights than those asserted by said corporation (no specifications thereof); (c) that the Shulman note was not valid or supported by adequate or legal

consideration (no specifications thereof); (d) that neither of said corporations were *bona fide* purchasers of the Shulman note; (e) that neither of said corporations took said note in good faith, or for value; (f) that both corporations had actual notice or knowledge of infirmities in said note, and the taking thereof amounted to bad faith; (g) that the September 6, 1957, Order provides that if the real property be sold, the lien and claims of LeRoy and Rosehedge be transferred to the proceeds of sale, but if the property be not sold, then LeRoy and Rosehedge are authorized to proceed with a foreclosure sale, and that the offer of and sale to S. Kohn was subject to trust deeds and was contrary to the July 6, 1956, Order, and July 19, 1956, Stipulation and September 6, 1957, Order, and was made without notice to creditors, or interested parties; (h) that, upon information and belief, the Order of September 6, 1957, was the result of a compromise, and that no notice of compromise was given to creditors; (i) irregularities in proceedings which prevented Petitioner from having a fair trial (no specifications); (j) accident and surprise (no specifications); (k) newly discovered evidence (no specifications); (l) error in law occurring at the hearing and excepted to by the parties injured by said Order (no specifications); (3) the Petition for Review of Referee's Order of September 6, 1957, also was incorporated by reference. The prayer asked that the Order of September 23, 1957, be reversed, and that its execution or enforcement be stayed [R. 75-81].

This Petition for Review does not set forth therein, as a ground of review, or otherwise specify as error, that the Referee's Order incorrectly determined her asserted claim that the Rosehedge lien claim and its chattel mortgage was extinguished and satisfied by the bid of and sale to S. Kohn. The Petition *expressly alleges the contrary, i. e.*, that the sale to S. Kohn was made *subject to the LeRoy and Rosehedge liens*, and therefore, is *not in accord with, and contrary to the July 6, 1956, Order* [R. 76-78].

Except for two specifications of grounds for review (subparagraph a of paragraph 7 [R. 78] and part c. of subdivision 6 of subparagraph b of paragraph 7 [R. 77-78]) most of the grounds of review are directed to Referee's Order of September 6, 1957 (the subject of a separate review), and were filed too late to review that Order, and seek to collaterally attack it. The only grounds directed to the September 23, 1957 Order assert that the bid of and sale to S. Kohn violated the Order of July 6, 1956, an untenable position rejected by the District Court.

There was no adversary, or other proceedings, between Rosehedge and Millie Sterett, before the Referee, either during the sale, or thereafter, prior to the Referee's Order Confirming Sale, dated September 23, 1957, which involved or litigated any question of priority of their respective chattel mortgages, or any question of the extinguishment or satisfaction of the Rosehedge lien claim and chattel mortgage. On the contrary, Millie Sterett was not present or represented at said sale, nor did she file any exceptions or objections thereto, or to its confirmation at any time prior to its confirmation [R. 117, 119, 131-132]; Referee's Order Confirming Sale does not determine, include, or involve any such issues.

The several Petitions for Review were heard by the District Judge on October 28, 1957. At this hearing, counsel for Millie Sterett served and filed a "Joinder of Millie Sterett in Petitions for Review," asserting for the *first time* that A. Bisno had been authorized to sign on her behalf the aforementioned Petitions for Review from Referee's Orders of September 6, 1957, and September 23, 1957, respectively, and stated therein that "*Millie Sterett hereby personally joins in said Petitions for Review*" [R. 127]. Also at this hearing Counsel for Millie Sterett served and filed a "Memorandum of Law in Support of

Petition for Review of Referee's Order of September 23, 1957," wherein she urged *for the first time*, that the lien claim of Rosehedge has been satisfied by utilizing the full amount thereof in the bid of S. Kohn at the sale, and extinguishing its chattel mortgage, and based such argument upon an isolated portion of the Referee's Certificate [R. 117-118]. The Referee therein *expressly stated* that the bid of S. Kohn was made *subject to the lien and claims of LeRoy and Rosehedge*, and to show that such bid was not prejudicial to the Bankrupt Estates, or to Trustee, the Referee, stated, *by way of illustration only*, that *in his opinion* such a bid was the *equivalent* of a bid which would have utilized the value of the LeRoy and Rosehedge claims, for had such a bid been made, the amount thereof increased by the utilization of the value of the LeRoy and Rosehedge claims, would have resulted in a credit upon the purchase price in the amount of the value of such claims, thus leaving the *net amount* of the purchase price received by the Bankrupt Estates and the Trustee, upon such a bid, in the same amount as that received by the Bankrupt Estates, and the Trustee, by the bid of and sale to S. Kohn, subject to such liens and lien claims. The Referee did not, by such illustration, state, find or determine that the bid of S. Kohn did utilize the value of the LeRoy and Rosehedge claims. He stated the *contrary*.

Both the Referee's Order Confirming Sale, and the District Judge's Order, directly contradict Millie Sterett's contention. The Referee's Order expressly confirms the sale of the property, *subject to the Rosehedge lien claim*, and the personal property, *subject to chattel mortgages* [R. 72, par. 6; 73]; the District Judge's Order confirmed the sale as made by the Referee, and adjudicated that the sale was one *subject to the Rosehedge lien claim* [R. 134-135]. There was no evidence offered or introduced before the Referee that the lien claims of LeRoy and Rosehedge had been utilized by the bid of S. Kohn. The terms of the bid

are to the contrary; no such evidence was offered or introduced before the District Judge on review.

The District Judge's Order Confirming, Affirming and Approving Referee's Order Dated September 23, 1957, as Modified by the Court was signed and filed on November 7, 1957, and entered on November 9, 1957. This Order [R. 128-139] modified the Referee's Order pertaining to taxes (not involved upon this appeal) [R. 133-134]; and as modified, affirmed the Referee's Order in all respects; it *expressly adjudged* the sale of the *real* property to S. Kohn to be a sale free and clear of all taxes, liens and encumbrances, *excepting only* the taxes, as modified, and the various liens as set forth in subparagraphs (2), (3), (4), (5) and (6) of the Referee's Order [R. 134-135]; (*subparagraph (6) is the lien indebtedness of Rosehedge*) it dismissed the several Petitions for Review, and denied the relief sought by the Petitioners, except as otherwise therein provided [R. 135-137]; and provided for the payment of the increased purchase price through an escrow [R. 137-138]. The said Order, however, *further ordered* Rosehedge to deposit a full release of its chattel mortgage in said escrow for delivery at the close thereof to Millie Sterett, a subsequent mortgagee [R. 136].

On December 12, 1957, Rosehedge timely filed a Notice of Appeal from that portion of the District Court's Order whereby Rosehedge was ordered to deposit in escrow a full release of its chattel mortgage, for delivery, upon the close thereof, to Millie Sterett [R. 139-141]. All other portions of said Order have become final. Rosehedge also filed an Undertaking for Costs on Appeal [R. 141-143].

B. Questions Involved.

1. Did the District Court err in ordering Rosehedge to deposit a full release of its chattel mortgage in escrow for delivery upon the close thereof to Millie Sterett, a subsequent chattel mortgagee, upon the record before the Dis-

trict Court upon Review from Referee's Order³ which confirmed the sale of encumbered personal property *subject to all chattel mortgages?*

2. Did the District Court upon Review from Referee's Order err in holding that Millie Sterett, a chattel mortgagee was a "person aggrieved" by Referee's Order which confirmed sale of encumbered personal property *subject to all chattel mortgages?*

3. Did the District Court upon Review from Referee's Order err in ordering Rosehedge to release its chattel mortgage, as aforesaid, in that the Sterett Petition for Review does not set forth any grounds for review, or any specification of error, specifying that Referee's Order erroneously determined her asserted claim that the bid of and sale to S. Kohn of the property, subject to specified liens (including Rosehedge lien) and all chattel mortgages, satisfied and extinguished the Rosehedge lien claim and its chattel mortgage?

4. Did the District Court upon Review from Referee's Order have jurisdiction to determine the question of the rights and priorities between Rosehedge and Sterett as to their respective chattel mortgages where the encumbered property had been sold to a third person subject to all chattel mortgages, and neither Trustee or the Bankrupt Estate had any interest in such controversy?

5. Did the District Court upon Review from Referee's Order err in ordering Rosehedge to release its chattel mortgage, as aforesaid, where no issue that the Rosehedge lien claim was satisfied, or its chattel mortgage extinguished by the bid of, and sale to S. Kohn, was ever raised or interposed before, or determined by, the Referee

³Referee's Order, as used herein, refers to Referee's Order Confirming Sale of Property Free and Clear of Lien Except Certain Specified Liens, dated September 23, 1957.

at or after the sale, and where no adversary proceedings between Rosehedge *and* Sterett upon such issue was ever held before or heard by the Referee, and no evidence upon such issue was introduced before the Referee, or upon Review before the District Judge?

6. Did the District Court upon Review from Referee's Order which confirmed sale of encumbered personal property *subject to all chattel mortgages* err in determining the question of the rights and priorities between Rosehedge and Sterett as to their respective chattel mortgages, under the circumstances set forth in preceding Question No. 5, thereby depriving Rosehedge of its day in Court, upon the merits of such issue or question, or should the District Court have required the parties to seek a determination of such rights and priorities in an appropriate proceeding before the proper forum—the State Courts.

7. Did the District Court, upon Review from Referee's Order, err in holding that, *as a matter of law*, the bid of and sale to S. Kohn, acting on behalf of LeRoy and Rosehedge, satisfied the lien claim of Rosehedge and extinguished its chattel mortgage as against Millie Sterett, a subsequent chattel mortgagee, who was not present or represented at such sale, and filed no objections thereto, or to the confirmation thereof, at any time prior to its confirmation, and who never urged such contention before the Referee?

8. Did the District Court, upon Review from Referee's Order, err in failing to dismiss the Sterett Petition for Review without relief to her, in that she was estopped from reviewing such order for failure to make timely objections thereto where she was not present or represented at said sale, after notice thereof, and made no objection to the bid, sale, or its confirmation thereat, and filed no objections thereto, or to the confirmation thereof, at any time prior to September 23, 1957, when Referee's Order was signed and filed?

9. Is the portion of the District Court's Order ordering Rosehedge to release its chattel mortgage to Sterett, as therein provided, supported by the evidence?

10. Is the portion of the District Court's Order ordering Rosehedge to release its chattel mortgage, to Sterett, as therein provided, contrary to the evidence?

11. Is the portion of the District Court's Order ordering Rosehedge to release its chattel mortgage, to Sterett, as therein provided, contrary to law for each and all of the reasons hereinbefore stated?

Specifications of Errors.

1. The District Court, upon Review from Referee's Order⁴ prejudicially erred in rendering that portion of its Order whereby Rosehedge was ordered to deposit a full release of its chattel mortgage in escrow for delivery upon the close thereof to Millie Sterett, a subsequent chattel mortgage claimant upon the grounds and for the reasons hereinafter specified.

2. The District Court, upon Review from Referee's Order, prejudicially erred in ordering Rosehedge to release its chattel mortgage through escrow to Millie Sterett, a subsequent chattel mortgagee, in that Millie Sterett was not a "person aggrieved" by Referee's Order which confirmed sale of encumbered personal property *subject to all chattel mortgages*, thereby fully protecting and preserving her right as a chattel mortgagee.

The bid of S. Kohn provided for the purchase of Trustee's interest in the personal property, *subject to all chattel mortgages* [R. 31] and it was so accepted [R. 110-112, 116, 119-120]. The Referee's Order [R. 66-74] confirm-

⁴Referee's Order refers to Referee's Order Confirming Sale of Property Free and Clear of Liens, Excepting Certain Specified Liens dated September 23, 1957 [R. 66-75].

ing such sale "subject . . . to all valid . . . chattel mortgages . . ." [R. 73]. The Judge's Order confirmed the Referee's Sale, as made, except for taxes [R. 134-135]. The Referee's Certificate [R. 119] states: "The Order Confirming Sale expressly protects her (Millie Sterett's) rights as a chattel mortgage lien claimant. It provides that said personal property was sold 'subject to all valid and subsisting conditional sales contracts and chattel mortgages against said personal property.' Whatever rights she may have in respect to her chattel mortgage, such rights are expressly preserved to her under the Order Confirming Sale" [also R. 83].

Under U.S.C.A., Title 11, Section 67c (Sec. 39c, Bankruptcy Act) Millie Sterett was not a "person aggrieved" by Referee's Order. The Referee's Certificate so states [R. 120, 84].

3. The District Court, upon Review from Referee's Order, prejudicially erred in ordering Rosehedge to release its chattel mortgage through escrow to Millie Sterett, in that the Sterett Petition for Review does not set forth any grounds of Review, or specification of error, specifying that Referee's Order erroneously determined her asserted claim that the bid of, and sale to S. Kohn satisfied and extinguished the Rosehedge lien claim and chattel mortgage, or even makes any reference thereto. Such contention was first asserted by Sterett in her "Memorandum of Law," at the hearing on Review.

There is *nothing* in the Petition for Review [R. 75-81] to the effect that sale to S. Kohn satisfied or extinguished the Rosehedge lien claim and its chattel mortgage, either as grounds for review, specification of error, or otherwise. On the contrary, Petitioner alleges that the offer of and sale to S. Kohn was *not free and clear, but was subject to liens* [R. 76-77, 78]. Certain of her specifications are directed to the sale of the real property, assert-

ing that it violated prior Orders; other specifications are directed to *Referee's Order dated September 6, 1957*, which granted the LeRoy and Rosehedge Motion, which involved the *real property only*. (These specifications came too late.) Such Order does not affect, relate to, or involve the Sterett chattel mortgage [R. 33-48, 83, 95-96]. The claim that the Rosehedge lien claim and chattel mortgage was satisfied and extinguished was *first asserted* in Sterett's "Memorandum of Law" served and filed *at the hearing* upon Review [R. 124-126]. This "Memorandum" cannot enlarge the scope of, or add to the Petition for Review.

4. The District Court, on Review from Referee's Order, prejudicially erred in ordering Rosehedge to release its chattel mortgage to Millie Sterett through escrow in that no issue or claim that the Rosehedge lien claim and chattel mortgage was satisfied and extinguished by the sale to S. Kohn was raised, interposed or presented before or determined by Referee at the sale, or thereafter; no adversary proceedings between Rosehedge and Sterett upon such issue ever was initiated or held before the Referee, and no evidence upon such issue was introduced before the Referee, or on Review before the District Judge.

Millie Sterett was given notice of sale [R. 119, 122, 132]; she was not present or represented at the sale; no objection to the bid of, or sale to S. Kohn was interposed at said sale; no objection on her behalf to the S. Kohn bid, or sale, or to the confirmation, was interposed thereat, or thereafter, prior to Referee's Order, signed and filed on September 23, 1957; no issue was raised, or claim was presented by Sterett, that the Rosehedge lien claim and its chattel mortgage, had been extinguished by the said bid and sale, at any time prior to the hearing on Review [R. 82-84, 110, 117, 119]; no hearing was had, or any evidence was ever introduced on that issue; the District

Court's Order also states the foregoing facts [R. 131-132].

5. The District Court upon Review from Referee's Order prejudicially erred in summarily determining the rights and priorities, between Rosehedge and Sterett as to their respective chattel mortgages, without any hearing thereon, or presentation of any evidence upon such issue, thereby depriving Rosehedge of its day in Court upon the merits of such issues. The District Court should have required Sterett to have such issues determined in appropriate proceedings, in the State Courts, since such issues were governed by State law.

(See references to record, and statements in respect thereto, set forth under Specification No. 4.)

6. The District Court upon Review from Referee's Order prejudicially erred in summarily determining the rights and priorities between Rosehedge and Sterett, as to their respective chattel mortgages, upon property sold to a third person subject to chattel mortgages, as the Bankruptcy Court did not have general jurisdiction to hear controversies between adverse third persons, which are not strictly and properly part of bankruptcy proceedings and not a necessary incidental to administration of bankrupt estates, and neither Trustee nor bankrupt estates had any interest in such controversy?

(See references to record and statements in respect thereto set forth under Specification No. 4.)

The controversy raised by Millie Sterett for the first time at the Review hearing [see Memorandum of Law, R. 124-126] was one *solely* between Sterett and Rosehedge. It was an irrelevant, ancillary and collateral matter so far as the administration of the bankrupt estates were concerned, since the sale of the personal property, subject to all chattel mortgages, preserved all of Sterett's

rights and remedies as a chattel mortgagee. It was not a necessary incidental to the administration of the bankrupt estates, and one in which neither Trustee nor Bankrupt Estates had any interest, and the Bankruptcy Court had no jurisdiction to determine such controversy.

7. The District Court upon Review from Referee's Order prejudicially erred in ruling, *as a matter of law*, that the bid of and sale to S. Kohn, on behalf of LeRoy and Rosehedge, satisfied and extinguished the Rosehedge lien claim and chattel mortgage, in favor of Millie Sterett, a subsequent chattel mortgagee, who was not present or represented at such sale, and filed no objection thereto, or to the confirmation thereof, at any time prior to signing and filing of Referee's Order.

(See references to record, and statements in respect thereto, set forth under Specifications Nos. 2 and 4.)

8. The District Court upon Review from Referee's Order prejudicially erred in failing to dismiss the Sterett Petition for Review without relief in that she was estopped from reviewing such Order for failure to make timely objection thereto, where she was not present or represented at the sale, after notice thereof; and no objection to the bid or sale was made thereat; she filed no objection or exception thereto, or to the confirmation thereof, at any time prior to the signing and filing of said Referee's Order.

(See references to record and statements in respect thereto set forth under Specification No. 4 hereof.)

9. The portion of the District Court's Order ordering Rosehedge to release its chattel mortgage through escrow to Millie Sterett, a subsequent chattel mortgage claimant, is prejudicially erroneous in that it is not supported by the evidence.

The evidence is as follows:

REFEREE'S ORDER [R. 66-74] recites the facts occurring and the proceedings had on September 6, 1957, at the sale, and contains the Referee's "informal findings" in respect thereto. This Order states that notice of sale was given to all creditors, lien holders, lien claimants, attorneys and all interested parties, and had been extensively advertised. That at the sale S. Kohn made an offer in open Court to purchase the real property, free and clear of liens, *except certain specified liens*, together with Trustee's right, title, and interest in certain personal property "subject . . . to all valid . . . chattel mortgages" for \$116,000.00 *cash*, payable through an escrow to be opened; that other bids were received; that the bid of S. Kohn was the highest and best bid made, and which could be obtained, and that the Court accepted the S. Kohn bid, *as made*; that said sale in all respects was regular; and in accordance with Orders of Court and provisions of Bankruptcy Act, and that it was in the best interests of the Bankrupt Estates; and that there was no opposition to said bid, sale, or its confirmation [R. 67-70].

The District Court's ORDER on Review [R. 128-139] states among other things, "that the statement of facts and the recital of the proceedings had, as set forth in the aforementioned Referee's Order, dated September 23, 1957, *are correct*, and by reference made a part hereof" [R. 130]; that each Petitioner on Review were given and received due notice of all proceedings; that the July 6, 1956, Order had become final; that due notice of the time and place of sale had been given to all creditors, lienholders, lien claimants, attorneys and other interested parties including all Petitioners on Review (Sterett) as required by law and the Bankruptcy Act, and to the general public; that Sterett was not present or represented at the sale; that no objection to the bid of, or sale to S. Kohn, or to

its confirmation, was made at the sale, or thereafter at any time prior to its confirmation by or on behalf of any Petitioner on Review, or by anyone; that no showing has been made by anyone that a better or higher bid, offer, or sale, could be had; that said sale complied with the Orders of Court; that the S. Kohn bid was made on behalf of LeRoy and Rosehedge; that the bid of S. Kohn was the highest and best bid made, and received at said sale, and the highest and best bid that could have been obtained for the property; that the Referee's sale was a public sale, legally made and fairly and impartially conducted and in all respects regular and in accordance with the Orders of Court and the Bankruptcy Act; and that said sale was in the best interests of the Bankrupt Estates [R. 130-132].

There is no recital, statement or finding in either the Referee's Order, or in the District Court's Order upon Review, that the bid of or sale to S. Kohn used, utilized, or included the value of the LeRoy and Rosehedge claims, or that said sale satisfied and extinguished the Rosehedge lien claim, and its chattel mortgage. There is no such evidence!

The *undisputed* evidence further shows that S. Kohn, on behalf of LeRoy and Rosehedge, made a written bid by which she offered to purchase the real property, *subject to certain liens, which included the Rosehedge lien*, and Trustee's interest in the personal property, *subject to all valid chattel mortgages*, for \$116,000.00 cash [R. 29-33, 110-112]. This bid was accepted, *as made*, and the property was sold to S. Kohn *in accordance* with the bid [R. 110-112, 116, 120-121]. The Referee's Order [R. 66-74] confirmed the sale as provided by the bid [R. 66-74, 90, 116, 120-121]. The District Court's Order affirmed the sale as made by Referee, with a modification of taxes [R. 134-135]. On September 6, 1957, the LeRoy lien claim was \$272,722.50 [R. 37-38], and the Rosehedge lien claim

was \$154,846.65 [R. 40-42, 84-87].⁵ The S. Kohn bid was for \$116,000.00 *cash* for the real and personal property, subject to various liens and chattel mortgages [R. 29, 69, 90, 111]; this was increased to \$117,500.00 *cash* before the District Judge [R. 130, 137-138]; and the sale was confirmed for \$116,000.00 and \$117,500.00 *cash*, respectively, subject to specified liens and all valid chattel mortgages.

Obviously, the aforesaid cash bid and purchase price did not include or utilize the value of the LeRoy and Rosehedge claims (\$427,569.15) since said claims were far in *excess of the actual bid and purchase price*. Nothing can be read into the record which did not exist, and which did not take place.

The Referee's *expression of opinion* [R. 124-126], used by way of illustration, that the bid by S. Kohn, subject to the liens and claims of LeRoy and Rosehedge, *in his opinion*, was the *equivalent* of utilizing the value of LeRoy and Rosehedge claims, is *not evidence*, and cannot support the portion of the Order from which Rosehedge has appealed. This expression is purely gratuitous; it is *not* a finding of fact (it was made long after Referee's Order was filed); it is not a *recital* of the facts which *occurred* at the sale (see Referee's Order); it is but an *expression of opinion* by the Referee, made *long after* the sale, and *subsequent* to the signing and the filing of the Referee's Order (it cannot impeach such Order); *it was used, by Referee, by way of illustration only*, to demonstrate that no prejudice resulted to the Bankrupt Estate, or the Trustee from the bid of and sale to S. Kohn, as made, subject to liens and chattel mortgages, for insofar as *net results*

⁵Referee's Certificate on Review from Referee's Order of September 23, 1957, incorporates by reference Referee's Certificate on Review from Referee's Order of September 6, 1957 [R. 91, 92, 119].

to the Bankrupt Estates, and the *net amount* of money received by the Trustee, were concerned [R. 120], the Kohn bid, *in the opinion of the Referee*, was the *equivalent* of a bid which would have utilized the value of the LeRoy and Rosehedge lien claims. While such a bid would have been increased by the value of such lien claims, when accepted, would have necessitated the giving of a credit for the value of such lien claims upon the purchase price, leaving the *net result* for the Bankrupt Estates, and the *net amount of money* received by the Trustee, from such bid, the *same* as that received from the bid of and sale to S. Kohn [R. 120]. That was the sole reason for the Referee's statement. The Referee did not thereby, or therein, state, or find, that the bid of S. Kohn, in fact, had included, or had utilized the value of the LeRoy and Rosehedge claims, or that it satisfied or extinguished the Rosehedge chattel mortgage. No such issue or question was then presented to or before the Referee. This is further illustrated by the "Status of Record" in Referee's Certificate [R. 121-123], wherein the evidence is summarized, and no reference is made to any utilization of the value of the Rosehedge claim in the S. Kohn bid; by Referee's statement that the Kohn bid, as made, subject to liens, was more beneficial to the Bankrupt Estates, since no part of the proceeds of sale could be charged with taxes [R. 120], and that the sale to S. Kohn, *as made*, did comply with that portion of the July 6, 1956 Order [par. 3, R. 6-7], which authorized the sale of the real property including the furniture, fixtures and other personal property contained therein, "*upon such terms and conditions as the Court shall hereafter approve*" [R. 120], which is severable, separate and distinct from the other portion of said Order (par. 4) which also authorized Trustee to sell the property free and clear of liens. The Trustee could sell under *either* provision.

The record is totally devoid of any evidence which shows that there was any announcement made at the sale that the Kohn bid included or utilized the value of the LeRoy and Rosehedge claims, or that it was so intended. The actual announcement made at the sale [R. 110-112] and the written bid submitted, filed and accepted thereat is directly to the contrary [R. 29-33, 111-112, 116].

10. The portion of the District Judge's Order upon Review ordering Rosehedge to release its chattel mortgage through escrow to Millie Sterett, a subsequent chattel mortgage claimant, is erroneous in that it is contrary to the evidence and to the recital of facts stated in both Referee's Order and District Court's Order.

The substance of evidence; the several references to the Record, and various statements made in connection therewith, as set forth under Specification No. 9, are equally applicable to this Specification, and are made a part hereof by reference.

11. That portion of the District Court's Order upon Review ordering Rosehedge to release its chattel mortgage through escrow to Millie Sterett, subsequent mortgage claimant, is prejudicially erroneous in that it is not supported by, and is contrary to law, for the reasons, and upon the grounds hereinbefore specified.

Summary of Argument.

The headings on our argument have been prepared so that they may serve as a summary. Accordingly, we incorporate by reference the index of the argument appearing at the commencement of this brief as the summary of the argument, and respectfully direct this Honorable Court's attention thereto.

ARGUMENT—POINTS AND AUTHORITIES.

I.

The District Court Upon Review, Prejudicially Erred in Ordering Appellant to Release Its Chattel Mortgage Through Escrow to Appellee Since Appellee Was Not "Party Aggrieved" by Referee's Order, and Was Not Entitled to Review the Same.

Sterett's Petition for Review alleges that she is a secured creditor holding a chattel mortgage upon personal property listed therein [R. 75, 82]. Her sole interest in the bankruptcy was that of a subsequent chattel mortgagee upon the personal property sold by Referee to S. Kohn, *subject to all valid chattel mortgages*. The Referee's Order [R. 66-74] confirmed the sale of Trustee's interest in the personal property "subject . . . to all valid . . . chattel mortgages" [R. 73].

U.S.C.A., Title 11, Section 67c (Bankruptcy Act Sec. 39c) provides "a person aggrieved by an order of a Referee may . . . file with the Referee a petition for review of such order by a judge. . . ."

This section limits the right of review to a "person aggrieved," and such person must have a direct—not indirect—interest in the decision appealed from. (*Rogers v. Bank of America* (9 Cir.), 142 F. 2d 128, 129; *In re Henry Woods & Sons Co.*, 279 Fed. 608; *In re Realty Foundation*, 75 F. 2d 286, 287; 2 *Coll. on Bkcy.* (14th Ed.) 1479 *et seq.*; 8 *Rem. on Bkcy.* (6th Ed.) 292.)

In *Rogers v. Bank of America*, *supra*, this Court states:

"The authority for instigating and maintaining the review of a referee's order by a judge under §39c is restrictive. It is granted only to those who have an immediate interest in the bankrupt estate, as such, and does not include those who would be indirectly affected by the order."

In re Camp Baking Co., 146 Fed. Supp. 935, 938, the Court defines a "person aggrieved" as one who has "a legal interest in the order sought to be reviewed."

It is well established that where trustee's interest in encumbered property is sold by Referee, subject to existing encumbrances, the mortgagees are not entitled to challenge or review an Order directing or confirming a sale of a bankrupt's equity in mortgaged property, subject to encumbrances, since, as creditors, they have no interest in preventing the sale, and as mortgagees, the sale cannot affect their security, or their remedy. A mortgagee is not a party aggrieved by such an Order, and his review therefrom will be dismissed.

In 8 *C. J. S.*, Bkcy., 1043 Par. 311b, the rule is thusly stated:

"... encumbered property may be ordered sold subject to the encumbrances, leaving the lienholder to enforce his lien on the property by appropriate proceedings; mortgagees who are also general creditors are not entitled to challenge an Order directing the sale of the bankrupt's equity in mortgaged lands, since, as creditors, they have no interest in preventing the sale, and as mortgagees, the sale cannot affect their remedy." (See also 6 *Rem. on Bkcy.* (6th Ed.) 85 §2575.)

In re Huneston (2 Cir.), 83 F. 2d 187, 189, the Circuit Court dismissed an appeal from an Order which dismissed mortgagee's petition from Referee's Order which directed Trustee to sell encumbered personal property, subject to all liens. The Court states:

"We cannot see by what warrant the mortgagees challenged the sale of the equity. It is true that they are general creditors, as well as lienors, but as creditors, they can have no interest in preventing a sale; and as mortgagees, it cannot affect their remedy in any way whatsoever."

In re North Star Ice & Coal Co., 252 Fed. 301, upon mortgagee's review of Referee's Order directing sale of bankrupt property subject to encumbrances, the Court states:

"... the Referee found . . . that it was advantageous to unsecured creditors to sell . . . property of the bankrupt . . . subject to all valid encumbrances. . . . The trustee was not directed to sell anything except the bankrupt's interest. *No rights of the mortgagee were affected or impaired*, and, as it stood solely in the position of a secured creditor asserting a valid lien upon the property . . . *I am of the opinion that it has no standing to revise the Order of the Referee*, which will accordingly be confirmed." (Italics ours.)

In re Burr Mfg. & Supply Co., 217 Fed. 16, 19, 20, upon appeal from Order setting aside sale subject to encumbrances, upon review by mortgagee, the Circuit Court reversed said Order and reinstated the sale, stating:

"Any person interested may apply to have the judicial sale vacated, unless by his actions, or his laches, he has become estopped. *But, he must be a party who is interested and injuriously affected by the sale.* (Citations.) *The mortgagees are without interest, because the Order confirming the sale was upon condition that the purchaser, Porter, should 'accept title subject to such, if any, liens as may be on the property.'*" (Italics ours.)

In *Smith v. McKenna Brass Mfg. Co.* (3d Cir.), 98 F. 2d 537, the Circuit Court held that a mortgagee cannot object to Trustee's sale of property sold subject to a mortgage, stating:

"Here the Trustee sold 'such right, title and interest' as the bankrupt had in the property . . . and the appellant not being injured by the sale, *for the lien*

of his mortgage not being affected, he cannot now be heard to object." (Italics ours.)

In *Gotkin v. Korn*, 182 F. 2d 380, in discussing a sale of chattels, subject to liens, the Circuit Court stated:

"It is perfectly clear, however, that where as here, the Bankruptcy Court chose to sell encumbered property subject to liens, it elects to sell only the bankrupt's equity therein, and so, in effect, *declines to exercise its exclusive power to deal with liens and relegates the holders to the enforcement remedies which would have been available to them had the lienee's bankruptcy not occurred.*" (Italics ours.)

In *Bradley v. Williams*, 202 S. W. 2d 149, the Court of Appeals of Kentucky, in referring to a sale in bankruptcy, subject to encumbrances, states: "It passed title to an equity. It neither hurt nor helped any lienholder."

Furthermore, Sterett, who filed a secured claim [R. 21-29] without waiving her security [R. 22], and who petitioned for review, *as a secured creditor, was without interest in the proceeds of the sale of the personalty sold "subject to all chattel mortgages."*

Where property of a bankrupt is sold subject to encumbrances, one having a lien thereon must look to the property alone for payment, and cannot claim payment out of the proceeds of such sale. (8 C. J. S., *Bankruptcy*, 1066, Sec. 322c; *In re Gerry*, 112 Fed. 957, 958; *In re Klapholz*, 113 Fed. 1002, 1003.)

It is crystal clear that Millie Sterett was not a "person aggrieved" by Referee's Order Confirming Sale. The Referee's Certificate so states [R. 118-121]. Her Petition for Review should have been dismissed without relief. The challenged portion of the Order on Review clearly is erroneous.

II.

The District Court, Upon Review, Prejudicially Erred in Ordering Appellant to Release Its Chattel Mortgage Through Escrow to Appellee in That Appellee Was Estopped From Reviewing the Referee's Order, for Failing to Make Timely Objection Thereto, Where, Appellee, After Notice, Was Not Present at, and Did Not Participate in the Sale, and Made No Objection to the Bid, or Sale, or to Its Confirmation, at Any Time Prior to Confirmation.

Millie Sterett was given notice of the sale [R. 110, 119, 122 par. 5]. The Referee's Order so states [R. 68-69] and the District Court's Order so recites [R. 132-133]. She was neither present on September 6, 1957, nor participated in the sale, and made no objection to the bid of or sale to S. Kohn thereat, or thereafter, or to its confirmation at any time prior to Referee's Order Confirming Sale filed September 23, 1957. Under these circumstances, Sterett's objection to the Order by way of Petition for Review was not timely, and she was estopped from reviewing the same.

It is now settled that the right of Petition for Review may be lost by estoppel. The concept is that one who has been accorded due notice of contemplated action, but who fails to put in an appearance, or be represented before a Referee, should not have a chance, by afterthought, to upset what has transpired. This is based upon logic, and the necessities of progress in the administration of justice. (8 *Rem. on Bkcy.* (6th Ed.), 294; 2 *Coll. on Bkcy.* (14th Ed.), 1480; *In re Rose* (9th Cir.), 86 F. 2d 69-71; *In re Peppers Fruit Co.*, 24 Fed. Supp. 119, 121, 122 (D. C. Cal.); *In re Mifflinburg Body Co.*, 54 Fed. Supp. 560-561.)

2 *Coll. on Bkcy.* (14th Ed.), 1480, states:

“Where matters are thus heard upon notice, reviews of order are limited to applications by parties who have appeared at the hearing before Referee, and participated therein.”

The foregoing rule is succinctly stated in *In re Peppers*, 24 Fed. Supp. 119, 121-122, wherein the California District Court states:

“This court feels that, in the interest of economy and efficiency of administration of bankrupt estates, reviews from referee’s orders, at least those orders which are made after notice, should be limited to applications by parties who have appeared at the hearing before the referee and participated therein. Any other holding would leave the door open to a flood of reviews which would result not only in delay and expense, but would place an almost intolerable burden upon the district judges.”

In *In re Mifflinburg Body Co.*, *supra*, the Court states:

“The reason for this rule is clear. When a party to litigation receives notice that a matter will be heard, it is his duty to appear at the hearing and present to the court evidence and legal authorities which will be of aid to the court in making its decision. If he does not do so, the court must make its decision without the benefit of any evidence which such person might have made available, and the court must act upon the presumption that persons who are absent are not interested in the matter before it, or will be satisfied with such decision as the court may make. To permit persons who did not participate in proceedings of which they are on notice to complain of the result of such proceedings would cause unlimited confusion and even disrespect of the courts and their authority.”

This Honorable Court has applied a similar rule in respect to appeals in *In re Rose* (9th Cir.), 86 F. 2d 69, 71.

Sterett not only did not appear at or participate in the sale before the Referee, but also did not object or except to the bid, sale, or its confirmation at any time prior to the Referee's Order Confirming Sale signed and filed seventeen days after the sale [R. 117].

It is also well established that anyone who desires to file objections to a sale should do so immediately, as objections are too late after confirmation. (6 *Rem. on Bkcy.* 43; *In re Shamokin Lumber and Const. Co.*, 54 Fed. Supp. 480, 481; 4 *Coll. on Bkcy.* (14th Ed.) 1579, *et seq.*)

Where no objections are filed to a sale prior to its confirmation, a Petition for Review to review the Order of Confirmation will be dismissed. (*In re Shamokin*, 54 Fed. Supp. 480, 481.) The reason for this is that judicial sales are an indispensable part of the machinery employed in administering bankrupt estates. Public policy requires that nothing be done to impair confidence in stability of judicial sales. (*In re Strunk Lane v. Jellico, etc., Co., Inc.*, 64 Fed. Supp. 731, 733; *In re Winthrop Mills*, 109 Fed. Supp. 323, 325; *Pewabic Mining Co. v. Mason*, 145 U. S. 249, 256; 36 *L. Ed.* 732.) After confirmation, such sale can only be set aside for the same reasons which equity would set aside a sale between private individuals. (*Dyar v. Stewart*, 123 F. 2d 278, 280; *In re Burr Mfg. Supply Co.*, 217 Fed. 16, 17; *In re Pneumatic Tube Steam Splicer Co.*, 80 F. 2d 524; 4 *Coll. on Bkcy.* (14th Ed.) 1586.)

Millie Sterett, who did not appear at or participate in the sale and made no objection thereto prior to its confirmation, ought not to have been permitted to sit back, and by review, take "pot shots" at the sale and its confirmation, particularly on grounds never urged or presented before the Referee. The law does not countenance such action.

The District Court should have dismissed the Sterett Petition for Review with relief. The challenged portion of its Order is clearly erroneous.

III.

The District Court Upon Review, Prejudicially Erred in Ordering Appellant to Release Its Chattel Mortgage to Appellee in That Appellee's Petition for Review Contained No Ground for Review, or Specification of Error Challenging Referee's Order Upon the Claim That the Sale to S. Kohn Satisfied and Extinguished Appellant's Lien Claim and Chattel Mortgage. Such Claim Was First Asserted in the "Memorandum of Law" Filed at the Review Hearing, Which Could Not Enlarge the Scope of the Petition.

No ground of review, or specification of error is set forth in Sterett's Petition for Review [R. 75-81], which challenged the correctness of the Referee's Order upon the ground that the bid of and sale to S. Kohn satisfied and extinguished the Rosehedge lien claim and its chattel mortgage, or that any such question was presented to or determined by the Referee in his Order. Neither does her specification of insufficient evidence include any such specification or claim [R. 77-78]. Such assertion was first urged in Sterett's "Memorandum of Law" served and filed at the Review Hearing [R. 124-126]. The District Court prejudicially erred in considering such argument and in granting the requested relief.

U.S.C.A., Title 11, Section 67c (Bankruptcy Act 39c), requires that the Petition for Review must "set forth the Order complained of and the alleged errors in respect thereto." The Petition must be reasonably clear and specific as to the errors charged. Errors of law should be assigned by setting forth the rule of law applied by the Referee, and stating the correct rule as contended by Peti-

tioner. A petition which merely alleges errors in general terms is insufficient. The reviewing Court is not required to search the Record to discover the issues sought to be raised or questions presented. (8 *Rem. on Bkcy.* (6th Ed.) 304; 2 *Coll. on Bkcy.* (14th Ed.) 1488-1489; *In re Casaudoumesq*, 46 Fed. Supp. 718, 725 (D. C. Cal.); *In re Moskowitz*, 63 Fed. Supp. 1000; *In re Ainsworth*, 5 Fed. Supp. 523, 524.)

The Petition on Review cannot be enlarged or aided by counsel's "Memorandum of Law" or briefs on file (*In re Ainsworth*, 5 Fed. Supp. 523, 524); nor by argument or statements of counsel not supported by the record (*In re Paley*, 26 Fed. Supp. 952).

An assignment of insufficiency of the evidence, without showing how it fails to support the Order is insufficient upon the grounds not specified. (*In re Musgrove*, 27 Fed. Supp. 341, 342.)

The District Judge should not pass upon errors not specifically designated, and should dismiss the petition, as the Bankruptcy Act does not contemplate a general review of the proceedings had before the Referee, or of rulings not directly affected by the Order. (2 *Coll. on Bankruptcy* (14th Ed.) 1488-1489; *In re Moskowitz*, 63 Fed. Supp. 1000; *In re Casaudoumesq*, 46 Fed. Supp. 718, 725 (D. C. Cal.); *In re Kelly Dry Goods Co.*, 102 Fed. 747, 748.)

In re Kelly Dry Goods Co., *supra*, at 748, the Court, in discussing the scope of a review states that this does not mean "that a general review of the proceedings before the Referee, or review of rulings not directly affecting an Order made is intended by the Act or rules."

This is particularly applicable on review from an Order Confirming Sale for the District Judge does not exercise his general equitable powers, but acts analogous to an Appellate Court, in reviewing the decision of the referee upon

the petition before it—a petition which must be legally sufficient, and by a person having a legal interest in the matter. (*In re Realty Foundation, Inc.*, 75 F. 2d 286, 288; *In re Orpheum Circuit*, 24 Fed. Supp. 101, 104.)

In *In re Moskowitz*, 63 Fed. Supp. 1000, the Court in discussing the requirements of Section 39c of the Bankruptcy Act, stated that a general assignment of errors in the petition was insufficient to justify any consideration of the review, and that the failure of the petition for review to meet the requirements of Section 39c is sufficient, by itself, to cause a dismissal of the Petition.

A review based upon grounds different from those set forth in the Petition will be dismissed without reference to the merits of the case. (*In re Wyoming Valley Collieries Co.*, 29 Fed. Supp. 106, 108; *In re Loring*, 30 Fed. Supp. 758, 759.) A petition which urges a question not raised before the Referee will not be considered. (*In re Wachtel*, 64 Fed. Supp. 229, 239; *In re Bender Body Co.*, 47 Fed. Supp. 224.)

This Court has adopted a similar rule pertaining to specifications of error in appellate procedure, and have declined to pass upon points not specifically designated, or not presented to and passed upon by the trial court. (*Humphrey Gold Corp. v. Lewis* (9th Cir.), 90 F. 2d 896, 899.)

The various specifications of grounds for review in the Sterett Petition which were directed to Referee's Order dated September 6, 1957, constituted a collateral attack upon such Order and could not be considered. Her Petition for Review of Referee's Order dated September 23, 1957, was filed more than ten days after filing of the September 6, 1957, Order. (*In re Wyoming Valley Collieries Co.*, 29 Fed. Supp. 106, 108; U.S.C.A., Title 11, Sec. 67c; Bankruptcy Act, Sec. 39c.)

For each of the foregoing reasons, Sterett's Petition should have been dismissed without relief. The challenged portion of the District Court's Order is clearly erroneous.

IV.

The District Court on Review Prejudicially Erred in Ordering Appellant to Release Its Chattel Mortgage Through Escrow to Appellee, a Subsequent Mortgagee, Since Said Court, as a Bankruptcy Court Had No Jurisdiction to Determine the Rights and Priorities Between Appellant and Appellee Regarding Their Respective Chattel Mortgages Since the Property Had Been Sold "Subject to All Chattel Mortgages" and Neither the Trustee nor the Bankrupt Estates Were Involved or Had Any Interest in Such Controversy.

Millie Sterett's contention, *first* urged at the Review hearing—that the sale to S. Kohn satisfied the Rosehedge lien claim and extinguished its chattel mortgage, and that Rosehedge should be compelled to release its chattel mortgage [R. 124-126]—was a controversy between adverse third persons, Sterett and Rosehedge, regarding the rights and priorities of their respective chattel mortgages. Neither Trustee nor the Bankrupt Estates were interested therein. The personal property had been sold and confirmed to S. Kohn by Referee, "subject to all valid chattel mortgages" [R. 66-75]. The Bankruptcy Court thereby declined to exercise its exclusive power to deal with liens and relegated the lien-holders to their enforcement remedies which they would have but for the intervention of bankruptcy. These liens were not affected or impaired by such sale. (8 C.J.S., *Bkcy.* 1043; 6 *Rem. on Bkcy* (5th Ed.) 85, §2575; *In re Huneston*, 83 F. 2d 187, 189; *In re North Star Ice and Coal Co.*, 252 Fed. 301; *In re Burr Mfg. & Supply Co.*, 217 Fed. 16 (1920); *Gotkin v. Korn*, 182 F. 2d 380.)

In *Gotkin v. Korn*, *supra*, the Circuit Court states:

"It is perfectly clear, however, that where as here the bankruptcy court chose to sell encumbered prop-

erty subject to liens, it elects to sell only the bankruptcy equity therein, and so, in effect, declines to exercise its exclusive power to deal with liens *and relegates the holders to the enforcement remedies which would have been available to them had the lienor's bankruptcy not occurred.*" (Italics ours.)

Where property of a bankrupt is sold subject to encumbrances, one having a lien thereon must look to the property alone for payment, and cannot claim payment out of the proceeds of such sale. (8 C.J.S., *Bkcy.* 1066, §322(c); *In re Gerry*, 112 Fed. 957, 958; *In re Klapholz*, 113 Fed. 1002, 1003.)

A Court of Bankruptcy is a Court of limited jurisdiction, possessing only the jurisdiction and powers expressly or by necessary implication conferred by statute, and as such it does not have general plenary jurisdiction in equity, but is confined in the application of the rules and principles of equity to the jurisdiction conferred upon it by the provisions of the Bankruptcy Act. Such jurisdiction does not extend to determine controversies between adverse third parties in which neither the trustee nor the bankruptcy estate has an interest, and which are not strictly and properly part of the bankruptcy proceedings. (8 C.J.S., *Bkcy.* 429, §21; *Evarts v. Eloy Gin Corp.* (9th Cir.), 204 F. 2d 712, 715; *Billings Credit Men's Assn. v. Bogert* (9th Cir.), 8 F. 2d 307, 309; *Smith v. Chase Nat'l Bank*, 84 F. 2d 608, 614-615; *In re Railroad Supply Co.*, 75 F. 2d 530, 532; *Central Hanover Bank & Trust Co. v. Kelby*, 132 F. 2d 873, 875; *Chauncey, et al. v. Dyke Bros.*, 119 Fed. 1, 3.)

In *Evarts v. Eloy Gin Corp.*, *supra*, this Court states the rule succinctly as follows (p. 715):

"Courts of Bankruptcy are invested with 'such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy pro-

ceedings.' Title 11, U.S.C.A., §11. However, the jurisdiction thus granted is not plenary equity jurisdiction. It is bankruptcy jurisdiction, limited to the express statutory authorizations. The equity jurisdiction conferred by the Act merely empowers the judge or referee in bankruptcy to employ the rules and principles of equity jurisprudence in the exercise of his bankruptcy jurisdiction. *Smith v. Chase Nat'l Bank*, 8 Cir., 1936, 84 F. 2d 608, 614; *Billings Credit Men's Ass'n v. Bogert*, 9 Cir., 1925, 5 F. 2d 307, 309; *Pepper v. Litton*, 1939, 308 U. S. 295, 304, 60 S. Ct. 238, 84 L. Ed. 281; 8 C.J.S., *Bankruptcy* §21. Thus appellant's invocation of the equity powers of the Bankruptcy Court is not sufficient to confer jurisdiction on the Bankruptcy Court of the issues raised here, in the absence of some statutory authority. See 8 Colliers on Bankruptcy, 14th Ed., §3.01."

In *Smith v. Chase Nat'l Bank*, *supra*, the Circuit Court states at page 615:

"The jurisdiction of the District Court, as granted by the Bankruptcy Act, is unquestionable bankrupt jurisdiction, and not general jurisdiction to hear and determine controversies between adverse third parties, which are not strictly and properly a part of the bankruptcy proceedings."

In *In re Railroad Supply Co.*, *supra*, 532, the Court states:

"It has generally been held that a Court of bankruptcy will not digress in the administration of a bankrupt estate to settle collateral disputes. Such a rule is obviously sound for its existence is to eliminate all extraneous issues from the bankruptcy proceedings and thus secure the early closing of the affairs of the bankrupt."

It is also well settled that where property is sold by a Referee, subject to liens, the lienholders have no interests in the proceeds of sale, and a Court of Bankruptcy has no jurisdiction to hear or determine controversies between adverse lienholders seeking to have their respective rights and priorities determined, merely because the claimants happen to be creditors of the bankruptcy estate, or merely because the liens affect a part of the bankrupt's property.

In 8 C.J.S., *Bkcy.* 926, the rule is stated thusly:

“A bankruptcy court, however, has no jurisdiction to adjudicate controversy having no proper relation to the business with which it is entrusted, and it will not assume jurisdiction to determine rights or liens which in no way affect the collection of the assets, the administration of the estate, and the distribution of the assets.”

In *Smith v. Chase Nat'l Bank*, 83 F. 2d 608, we find the following at 615:

“In *Chauncy et al. v. Dyke Bros. et al.* (C.C.A. 8), 119 F. 1, 3, this Court speaking through Judge Thayer, said: ‘*The bankrupt court had no rights to assume jurisdiction of a controversy between third parties, in which the trustee was not concerned, and decide whose claim was paramount in equity, merely because the claimants happened to be creditors of the bankrupt estate, or merely because the liens affected a part of the bankrupt's property. The bankrupt act confers no such authority.*’ ” (Italics ours.)

Chauncey et al. v. Dyke Bros. 119 Fed 1, 3 (wherein the aforesaid rule was stated, but the Court assumed jurisdiction because the lienholders would have an interest in the sales proceeds).

In *Tuck v. Patterson*, 60 S. W. 2d 328; 29 A. B. R. (N. S.) 88, an attempt was made by adverse third parties,

to impose a trust in property sold by the Bankruptcy Court, and it was urged that such Court had jurisdiction to determine such controversy. The Court states:

“The remedy would *not* require an *avoidance* of the conveyance made by the trustee nor reclamation of the land. *To the bankruptcy court belonged the power to make sale of the land of the bankrupt estate and to confirm the grant to the purchaser. The very subject-matter of its jurisdiction is the disposition and distribution of the bankrupt’s estate. The jurisdiction of the bankruptcy court, however, is exhausted and it loses its absolute power upon the sale and confirmation of the sale of the land. In the sale and disposition of the land there is complete and effectual execution of the powers given to the bankruptcy court of administration upon the land.*” (Italics ours.)

Likewise, in the instant case, a determination of Sterett’s claim that the S. Kohn bid and sale had extinguished the Rosehedge chattel mortgage *did not require the avoidance* of the sale or transfer of the property by the Trustee to S. Kohn. Such issue was totally *collateral to the sale* of the property, and to the bankruptcy proceedings.

It is well settled that where an Order of the Bankruptcy Court is partly within and partly without the Court’s jurisdiction, the part without the jurisdiction *is void*. (*U. S. ex rel. Emanuel v. Jaeger*, 117 F. 2d 483.) The Court therein states, “. . . Where an Order is partly within and partly without the Court’s jurisdiction, the part without is void.”

The part without the jurisdiction is *coram non judice*. Like a dead limb upon a living tree, the void portion of the Order may be severed from the valid part without impairing the validity of the remaining portion of the Order.

A controversy between lien claimants as to their respective rights, particularly where the property is sold "subject to liens," should be determined by appropriate proceedings in a State Court, since such issues are governed by State laws. (*In re Kernick Divide Mining Co.*, 3 Fed. Supp.. 323 (D. C. Nev.); *Gotkin v. Korn*, 182 F. 2d 380.)

In the instant case, Sterett, upon Review, requested the District Court to determine that her chattel mortgage was paramount to Rosehedge's chattel mortgage as a result of the sale to S. Kohn. Neither the Trustee, nor Bankruptcy Estates had any interest in such controversy since the property had been sold "subject to all valid chattel mortgages." This controversy was one *solely* between Sterett and Rosehedge. The District Court, as a Court of Bankruptcy, *could not exercise its broad general equitable jurisdiction* to adjust the equities between those parties. Sterett in her "Memoranda of Law" [R. 124-126] claims that she was aggrieved by Referee's Order Confirming Sale *because Rosehedge refused to release its chattel mortgage* [R. 125]. A clearer example of a controversy between adverse third parties wherein neither the Bankrupt Estate nor the Trustee have any interest cannot be found, and the Bankruptcy Court would have no jurisdiction to determine such controversy. That portion of the District Court's Order ordering Rosehedge to release its chattel mortgage through escrow to Sterett, a subsequent mortgagee, is clearly without its jurisdiction, and is void. It should be stricken from the Order.

V.

The District Court Upon Review Prejudicially Erred in Ordering Appellant to Release Its Chattel Mortgage Through Escrow, as Such Portion of Its Order Is Not Supported by the Evidence in That There Is No Evidence That Appellant's Lien Claim and Chattel Mortgage Was Satisfied and Extinguished by the Bid and Sale.

The evidence upon this subject, with appropriate references to the record, is fully discussed and set forth under appellant's Specification of Error No. 8. To avoid unnecessary duplication, we respectfully make the same a part hereof by reference.

Briefly this evidence shows that the written bid made by S. Kohn [R. 29-33, 110-112]; the acceptance of said bid by the Referee, *as made* [R. 110-112, 116, 120-121]; and Referee's Order Confirming Sale [R. 66-74] *without contradiction*, that the property was sold to S. Kohn for \$116,000.00 cash, the real property, subject to certain liens, including the Rosehedge lien and lien claim, and Trustee's interest in the personal property, subject to all valid chattel mortgages [R. 66-74]. The District Court's Order affirmed and confirmed the sale, *as made* by the Referee (excepting a modification of taxes) and expressly adjudicated that the real property was sold free and clear of all liens, except certain specified liens, *which included the Rosehedge lien and lien claim* [R. 134-135]. The purchase price was increased by \$1,500.00 (to cover costs of preservation) to \$117,500.00 *cash* [R. 130], but said property, nevertheless, was sold *subject to the aforesaid liens and chattel mortgages*.

On September 6, 1957, the Referee also adjudicated that LeRoy's secured lien claim was \$272,722.50 [R. 37-38], and that Rosehedge's secured lien claim was \$154,846.65, and on said date made and filed his Order thereon [R. 33-48].

The Referee's Order and the District Court's Order *do not recite, state, or find* that the bid of and sale to S. Kohn used or utilized the value of the LeRoy and Rosehedge claims, or either of them, or extinguished the Rosehedge chattel mortgage.

The proceedings had, and the statements made at the sale on September 6, 1957, as disclosed by Referee's Certificate [R. 110-116] *do not disclose*, any statement or announcement made or proceedings had at said sale which either announced or stated that the S. Kohn bid did, or was intended to, use, utilize, or include the value of the LeRoy and Rosehedge claims, or either of them. On the contrary, the announcement made, and the bid submitted at the sale, both oral and written, by S. Kohn, disclosed that S. Kohn offered to purchase the real property, *subject to specified certain liens* (including Rosehedge's lien) and Trustee's interest in the personal property *subject to all valid chattel mortgages*, and that this bid, *as made*, was *accepted* [R. 29-33, 111-112, 116], and *confirmed* [R. 64-74]. Neither Referee's summary of the evidence under Status of the Record [R. 121-123], or his The Questions Presented [R. 123] found in Referee's Certificate, contains any summary, statement, recital or finding that the S. Kohn bid and sale utilized or used the Rosehedge claim or extinguished its chattel mortgage, or that any such question was determined or presented.

The isolated portion of the Referee's Certificate set forth in Sterett's "Memorandum of Law" [R. 124-126] is insufficient *as a matter of fact and of law* to sustain the challenged portion of the District Court's Order [R. 117]. The Record contains nothing further on that subject. The statements in the extracted portion of Referee's Certificate were *not* made at the sale; they were *not* a part of the proceedings had thereat; the *sale had been completed* [R. 116]. This statement was *first made by Referee* in

Referee's Certificate on Review, *solely* for the purpose of *disproving* certain contentions urged on Review. But even the quoted statement [R. 124-126] fails to sustain Sterett's contention. It *discloses* [R. 117] that "This bid (S. Kohn bid) *was made subject to the liens and lien claims of LeRoy and Rosehedge*"; it indicates that the bid *did not include or utilize the value of such claims*, for it states: "Had the bid been increased by the value of such lien claims, a credit upon the purchase price in the amount of the value of said lien claims would have had to be given," thus patently disclosing that the *actual bid made had not been increased by utilizing the value of the LeRoy and Rosehedge claims*. The expression "This, in the opinion of the Referee, at the time of sale was the equivalent of utilizing the value of the LeRoy and Rosehedge claims upon the bid made" *does not state that such values actually were used. It merely illustrates that so far as the net result to the Bankrupt Estates, and the net amount of money received by the Trustee, were concerned, the bid of S. Kohn was the equivalent of a bid which would have been increased by the value of the LeRoy and Rosehedge claims, for if such a bid had been made, a credit equal to the value of such lien claims would have had to have been given upon the purchase price, thereby reducing it to the same net amount of cash actually received on the S. Kohn bid* [R. 120]. The Referee further, by way of illustration, showed that the S. Kohn bid *as made* (subject to specified liens and all chattel mortgages) was more beneficial to all creditors, than a free and clear bid would have been. He also stated that the S. Kohn bid and sale, *as made* (subject to liens and chattel mortgages), *in fact, did comply* with the provisions of the July 6, 1956, Order which also expressly provided for the sale of the real property "including . . . personal property . . . upon such terms and conditions as the Court shall hereafter approve." The foregoing, *as a matter of fact*, discloses that the S. Kohn bid did not, and could not have

utilized the value of the LeRoy and Rosehedge claims. *As a matter of law*, Sterett's contentions cannot be sustained.

It is axiomatic that the Referee's Certificate, like any other judicial document, must be read and construed in its entirety, and isolated extracts therefrom must be read and construed with the other portions of the document. Furthermore, the language used must be read and construed *in the light of the facts and issues then before the Referee*. (21 C.J.S. Courts, 408, 412; *Porter v. Bakersfield*, 36 Cal. 2d 582, 590, 255 P. 2d 223.)

When the Referee made the statement relied upon by Sterett, and expressed his opinion therein, *there was no question or issue before him* whether the bid of and sale to S. Kohn *had utilized* the value of the Leroy and Rosehedge claims, and had extinguished Rosehedge's chattel mortgage. This contention *was first urged at the hearing upon Review*, and finds no basis in the Record.

The District Court, in reviewing a Referee's Order, is limited *to the record* before the Referee, and cannot accept arguments by or statements of counsel, as evidence. (*In re Paley*, 26 Fed. Supp. 952.) Evidence not taken or admitted before the Referee *cannot be considered on review*. (*In re Palmer Realty Corp.*, 54 Fed. Supp. 656.)

It is also well established that in a Bankruptcy sale, the Referee's Order Confirming Sale *is controlling and fixes the terms of sale and the rights and obligations of all parties*. (*In re Strand Theatre*, 109 Fed. Supp. 352; *In re Toledo Co.*, 152 F. 2d 210, 211; *American Dirigold Corp. v. Dirigold Metals Corp.*, 125 F. 2d 446, 454; *In re Rapier Sugar Feed Co.*, 13 Fed. Supp. 85, 89.)

Any subsequent reasons, expressions, or statements for such Order cannot impeach the actual Order, as made, for, as stated by the District Court, *In re Mercury Engineering Co.*, 60 Fed. Supp. 786, 788: "*The Referee speaks*

to the Court through his order which grants or denies certain things, and not through the reasons for the order." (Italics ours.)

General conclusions, or expressions of opinion by a Referee, unsupported by testimony, or excerpts therefrom, are insufficient to show a meritorious cause for review. (*In re Sadler*, 104 Fed. Supp. 886, 890; *In re Wachtel*, 64 Fed. Supp. 229, 230.)

The expression of opinion by the Referee that the bid of S. Kohn was the equivalent of utilizing the value of the Leroy and Rosehedge claim is *not a finding* that such values were used. Conclusions of a Referee are not, and cannot be used as findings of fact. (*In re Pioche*, 235 F. 2d 903; *In re Sadler*, 104 Fed. Supp. 886, 888; *In re Mercury Engineering Co.*, 60 Fed. Supp. 786, 788.)

Even if we *assumed* that such expressions of opinion by the Referee, as made in his Certificate on Review, *long after* the signing and filing of his Order, may be considered as "findings," such "*findings*" cannot be used to impeach the Referee's Order, or to sustain the challenged portion of the District Court's Order on Review.

It is well settled that a Referee *cannot make additional Findings of Fact after a Petition for Review is filed*. (*In re Peoria Braumeister Co.*, 138 F. 2d 520, 522; 8 Rem. on Bkcy. (6th Ed.) 310.)

In re Peoria Braumeister Co., *supra*, at 522, the rule is succinctly stated as follows:

"[1, 2] First of all, feel constrained to express our view that it was improper for the referee to make additional findings of fact in his certificate after the petition for review had been filed. It should be noted that the referee made his order on April 2, 1942; that the appellant filed its petition for review on April 13, 1942; and that the additional

findings . . . were made on September 24, 1942. Neither §39, sub. a(8) of the Bankruptcy Act, 11 U. S. C. A. §67, sub. c, which deals with the review of a referee's order, providing that the petition for review '* * * shall set forth the order complained of and the alleged orders in respect thereto,' contemplates that a referee may make additional findings of fact some five months after a petition for review has been filed. *Instead* §39, sub. c, *requires* that the petition for review set forth the alleged errors committed by the referee. This is obviously impossible if the referee is allowed to make additional findings after the petition is filed." (Italics ours.)

Where there are neither pleadings nor proof respecting an issue, a "finding" by the Referee on such matter will be disregarded. (*Matter of Pittsburgh—Big Muddy Coal Co.*, 215 Fed. 703, 706; 2 *Collier on Bkcy.* (14th Ed.) 1502.)

The fact that S. Kohn made the bid and sale in her name, but was acting on behalf of Leroy and Rosehedge is not sufficient to sustain the contention that such bid and sale satisfied the Rosehedge lien claim and extinguished its chattel mortgage, either as a matter of fact, or of law.

Merger of a lien with title, and extinguishment of a mortgage debt is a matter of intent, and this is a question of fact. It is well settled that a merger of lien, or a satisfaction of mortgage debt does not result from a conveyance of the equity of redemption to an agent or trustee of the mortgagee; where a mortgagee takes title in the name of another to hold in trust for the mortgagee, there is no intent to merge the lien or satisfy the mortgage debt, particularly so when the property is purchased and conveyed "subject to encumbrances."

Furthermore, the law is well settled that a merger of lien, and the extinguishment of a mortgage debt will

not result, where the rights of inferior lien claimants are involved; it will be presumed in such case that the mortgagee intended that which would best accord *with his own interest*, and that he did not intend to merge his lien and extinguish his debt for the benefit of an inferior lien claimant.

These and other well established principles of law, together with their applicable citations, *will be fully set forth in the* next succeeding point of this Brief, Point VI. To avoid unnecessary duplication, we respectfully direct the Court's attention to said Point VI for a full discussion of the law upon this subject.

The evidence herein is totally insufficient to sustain the challenged portion of the District Court's Order.

VI.

The District Court Upon Review, Prejudicially Erred in Holding That the Bid of and Sale to S. Kohn, Acting on Behalf of Appellant and Leroy, as a Matter of Law, Satisfied Appellant's Lien Claim, and Extinguished Its Chattel Mortgage in Favor of Appellee, a Subsequent Chattel Mortgage.

A merger of lien and extinguishment of the mortgage debt is a *matter of intent and a question of fact*; a bid in the name of and a sale to a third person indicates no intent by a mortgagee to merge the lien and extinguish the debt, *particularly where the rights of inferior lien claimants intervene*.

The District Court on Review ruled, as a matter of law, upon the Record before it, that the bid of and sale to S. Kohn, satisfied Rosehedge's lien claim, and extinguished its chattel mortgage in favor of Sterett, an inferior chattel mortgagee; therefore, it ordered Rosehedge to release its chattel mortgage through escrow to Sterett.

That the evidence fails to sustain such ruling has been demonstrated under our preceding Point V. We will now show this ruling is incorrect *as a matter of law*. The only substantial evidence before the District Court was that the bid was by and in the name of S. Kohn, who was acting on behalf of Leroy and Rosehedge. [R. 110-111.] The property, however, was sold and confirmed by the Court to S. Kohn *subject to specified liens and all chattel mortgages* for \$116,000.00 cash (on review increased to \$117,500.00 to cover additional costs of preservation.)

To effectuate a merger, the *right* or *estate* previously held, and the right or estate subsequently acquired *must coalesce* in the *same* person, and in the *same right and capacity* without any *intervening* equity or right, and with the *intent* of such person to *merge* the *two* estates and *extinguish* the lesser one. (*In re May*, 10 Fed. Supp. 829, 831; *Walters v. Baer*, 50 F. 2d 995, 996-997; *Sheldon v. LaBrea*, 216 Cal. 686, 690, 15 P. 2d 1098; *Buell v. Simon Newmark*, 61 Fed. Supp. 157-159.)

In order to effectuate a merger, the whole title, legal, as well as equitable, must unite in *one* and the *same* person in the *same capacity*. (*In re May*, 10 Fed. Supp. 829-831; *Walters v. Baer*, 50 F. 2d 995, 996; *Sheldon v. LaBrea*, 216 Cal. 686, 690, 15 P. 2d 1098; *Boye v. Voerner*, 12 Cal. App. 2d 186, 187, 54 P. 2d 1116.)

A recital in a deed, or other instrument, that the property is acquired subject to liens, encumbrances, or chattel mortgages, *shows no intent* to extinguish the lien and mortgage debt, and there can be no merger of either the lien or the extinguishment of the mortgage debt. (*Anglo-California Bank v. Field*, 146 Cal. 644, 652-653, 80 Pac. 1080; *Philadelphia Savings Fund Society v. Stern*, 23 A. 2d 413, 243 Pa. 534; *Monheit v. Cigna*, 28 Cal. 2d 19, 25, 168 P. 2d 965.)

Mergers of liens are *not* favored in law. The question whether a conveyance constitutes a merger of lien, and extinguishes the mortgage debt is a question of intent—the *mortgagee's intent*, who has the *election in equity* to prevent the merger and keep the mortgage alive.

In 59 C.J.S. Mortgages 677, we find the following:

“The question whether a conveyance of the equity to the mortgagee results in a merger of the mortgage and fee is primarily one of intention of the parties, particularly, according to the decisions on the question, the intention of the mortgagee, for the mortgagee has an election in equity to prevent a merger and keep the mortgage alive.” (To same effect: *Toston v. Utah Mortgage Loan Corp.*, 115 F. 2d 560, 562; *Guaranty Trust Company of N. Y. v. Minneapolis & St. L. Ry. Co.*, 36 F. 2d 747, 764.)

Such intent is a question of fact. (*Hines v. Ward*, 121 Cal. 115, 118, 53 Pac. 427.)

It is well established that a merger does *not* result from the conveyance or transfer of the equity or redemption *to an agent or trustee of the mortgagee*. An intent not to effectuate a merger is indicated where the mortgage is referred to as an existing lien, and when the mortgagee takes title in the name of another, either as agent of, or trustee for the mortgagee.

In 59 C.J.S., p. 674, it states:

“A merger does not result from the conveyance of the equity of redemption to an agent of the mortgagee. . . .”

On page 680 of the same volume, we find:

“On the other hand, an intent not to effectuate a merger is indicated where the mortgage is referred to as a subsisting lien in the deed to the mortgagee . . . or where the mortgagee takes title *in the*

name of another, or where such other takes title to hold in trust for the mortgagee. . . ." (Italics ours.) (To same effect: *Humrich v. Dalzell*, 166 Atl. 511, 512, 113 N. J. Eq. 310; *Knowles v. Older*, 220 N. W. 625, 57 N. D. 128; *Knowles v. Tuttle*, 220 N. W. 623, 57 N. D. 138; *Hamilton v. Riddell*, 60 S. W. 2d 881; 41 C.J. 778; *Silverstein v. Saster*, 189 N. E. 540, 285 Mass. 453; *Barber v. Hartley*, 298 Pac. 226, 136 Ore. 210.)

In *Humrich v. Dalzell*, *supra*, the facts are almost identical with the instant case. In a foreclosure action, the defendants claimed "a merger of the legal title with equitable title under the mortgage and satisfaction or extinguishment of the debt secured by the mortgage." The property had been conveyed to one Mary T. McCartney "subject to all liens and encumbrances" who was a secretary of Complainants' solicitor. She, in turn, conveyed the property to Complainant's son "subject to all encumbrances of record." It was conceded that Mary T. McCartney took title as the nominee and agent of Complainant, who paid the consideration for the conveyance, and that property was conveyed to Complainant's son "as the agent for the Complainant." In rejecting defendant's claims of merger and extinguishment, the court states (p. 512):

"[I] Merger is not favored in equity, and is never allowed, unless for special reasons and to promote the intention of the party, and, where equities are subserved by keeping the mortgage alive, and no injury is thereby wrought, it is not extinguished. (Citation.) The conveyance of the fee to a mortgagee will not merge his mortgage, where such intention on his part does not exist. (Citation.) The controlling fact in all instances is the intention of the person in whom the respective interests are united. . . .

“In the instant case, the evidence documentary and oral leaves no doubt that the complainants intended that the mortgage should not merge. It was the complainant Frank Humrich’s testimony . . . that he arranged to have the conveyance made to Miss McCartney, the secretary to Mr. Edward S. Atwater, Jr., who was complainants’ solicitor at that time to protect his interest in the same. . . .

“‘The fact that Humrich advanced the \$200 for the purchase of the equity of redemption and obtained it to be conveyed to another to hold for his benefit is evidence that there was no intention to merge the equity of redemption with the mortgage, and it will not be held to have merged.’ (Citations.) *‘Merger does not result from the conveyance of the equity of redemption to an agent of the mortgagee. 41 Corpus Juris, §880, p. 783.’*” (Italics ours.)

In *Barber v. Hartley, supra*, the Court states:

“No principle is better settled than a mortgagee purchasing an equity of redemption *preserves his mortgage unmerged by taking a conveyance to a trustee.*” (Italics ours.)

In *Knowles v. Tuttle, supra*, *Knowles v. Older, supra*, and *Hamilton v. Riddel, supra*, the conveyances were taken in the name of the spouses of the mortgagee. In each of said cases, it was held that taking title to the property *in the name of a third person evidenced an intent not to merge the lien or extinguish the mortgage indebtedness, and that no merger resulted.*

In the instant case, the Sterett chattel mortgage was subsequent and inferior to the Rosehedge chattel mortgage. [R. 10-12.] This was conceded. [R. 124.] The Trustee’s interest in the personal property was purchased

“subject to all valid and subsisting sales contracts and chattel mortgages against the personal property.” Obviously Rosehedge, for *its own interest and protection*, would not merge its chattel mortgage and extinguish its mortgage debt, for the benefit of inferior chattel mortgagees. The fact that the bid was made by and in the name of S. Kohn, and the sale was confirmed in her name, and the Trustee was ordered to convey and transfer the property to her, and in her name, subject to specified liens, and all chattel mortgages, indicates an intention *not to merge* the chattel mortgage lien, and *not to extinguish* the mortgage debt.

It is the *universal rule* that where there are intervening liens or rights, *it is presumed, as a matter of law*, that the mortgagee intends to *retain* his chattel mortgage and fully *protect* his mortgagee's lien and rights, and that *no merger* will be implied, or will result, *even where mortgagee takes title in his own name*. Equity will keep the legal title and mortgagee's interest *separate though they are held by the same person, whenever it is necessary for the full protection of mortgagee's interest*. The afore-said rule applies when the intervening lien is a chattel mortgage. (33 Cal. Jur. 2d 672; 59 C.J.S. Mortgages 682, 683; *The Bergen*, 64 F. 2d 877.) Most certainly such a rule is applicable where legal title is taken in the name of, and held by, a *third person*, subject to all *chattel mortgages*.

The foregoing principle of law is applied and stated in the Ninth Circuit Court's own case of “*The Bergen*,” 64 F. 2d 877. The Court states (pp. 880-881):

“The majority rule is thus stated in 39 L. R. A. (N. S.) 839, note (b) (1): ‘By the weight of

authority, a discharge by the mortgagee of his lien and the surrender of the evidence thereof to the mortgagor . . . does not operate as an extinguishment of the lien as against junior or intermediate encumbrances, and the senior lien still retains its priority. Different theories to sustain this doctrine are advanced by the cases, but with few exceptions they all reach this result.'

"In 41 C. J. 779, the following language is found: 'A merger will not be held to result wherever a denial of a merger is necessary to protect the interests of the mortgagee, the presumption being, in the absence of proof to the contrary, that he intended to do what would best accord with his interests. On this ground a merger has been denied even where the conveyance was admittedly made in satisfaction and cancellation of the indebtedness, or where the mortgagee took the conveyance under the mistaken belief that a merger would result but with no desire or agreement on his part to bring it about.' . . .

" . . . the doctrine of merger, in the common law and in equity, in the latter it has been uniformly held that where an incumbrancer, by mortgage or otherwise, becomes the owner of the legal title or of the equity of redemption, *the merger will not be held to take place if it be apparent that it was not the intention of the owner, or if in the absence of any intention said merger was against his manifest interest.* . . .

"The rule in California is in harmony with that of the majority. In 18 Cal. Jur. §§390, 391, pp. 76, 77, the doctrine is thus stated: 'Indeed it is presumed as a matter of law that the party must have intended to keep on foot his mortgage title when it is essential to his security against an intervening title

or for other purposes of security; and this presumption arises although the parties, through ignorance of such intervening title or through inadvertence, have actually discharged the mortgage and cancelled the notes with the intention to extinguish them.' ” (Italics ours.)

Most certainly where the bid was made by, and in the name of S. Kohn, and *not* by, or *in the name* of Rosehedge, *subject to all chattel mortgages* [R. 29-33, 110-112, 116] and the Referee's Order confirmed said sale to S. Kohn “subject to all chattel mortgages” [R. 66-74, 73], and not to or in the name of Rosehedge, and Sterett had an inferior, intervening chattel mortgage, *the law would not presume that a merger was intended*, but on the contrary, *the law would presume that no merger was intended*. The District Court could not summarily decree, *as a matter of law*, on the Record before it, that a merger and extinguishment of the Rosehedge mortgage and mortgage debt took place, and thus order Rosehedge to release its chattel mortgage through escrow in favor of a subsequent inferior chattel mortgage. The law is directly to the contrary. The District Court prejudicially erred in ordering Rosehedge to release its chattel mortgage through escrow to Millie Sterett.

VII.

The Disitric Court Upon Review Prejudicially Erred in Depriving Appellant of Its Day in Court Upon the Merits by Summarily Determining the Chattel Mortgage Rights and Priorities Between Appellant and Appellee, Where There Was No Pleading, No Notice of Hearing, or Hearing, or Presentation of Evidence Upon That Issue. Such Issue Was Properly Triable in Appropriate Proceedings in the State Court.

The District Court summarily determined the rights and priorities between Rosehedge and Sterett upon their respective chattel mortgages, upon the merits. Upon review from Referee's Order Confirming Sale, it neither had the right nor the power to do so. Those were matters for future determination in appropriate proceedings before the State Courts, as those issues were governed by State law. (*In re Kernick Divide Mining Co.*, 3 Fed. Supp. 323 (D. C. Nev.); *Gotkin v. Korn*, 182 F. 2d 380; 8 C.J.S., *Bkcy.* 936, 1043; *In re Westley Corp.*, 18 Fed. Supp. 347.)

In 8 C.J.S. 936, we find the following:

“Where, however, the priority of conflicting liens depend upon the construction of State statutes, the question should be decided by appropriate proceedings in a State Court.”

In re Kernick Divide Mining Co., *supra*, the District Court of Nevada, when confronted with the question of whether the Bankruptcy Court, or State Court should determine the question of priorities between lien claimants states:

“Questions of this character ought, if possible, to be determined by the state courts for the reason that the federal courts are bound by the construction placed upon state statutes by the state courts, while

the reverse is not the rule. A serious attack is also made against the decree in the Ward suit. The controversy between these two parties, especially respecting validity, amount, and priority of lien, ought to be determined by appropriate proceedings in the state court."

Particularly is the foregoing rule applicable where the property is sold and confirmed by the Bankruptcy Court, *subject to encumbrances*, for in such sales the lien claimants cannot challenge or review such Order. (Points and Authorities, Point I of this Brief.)

Assuming, but not conceding, that the Bankruptcy Court had jurisdiction to determine the rights and priorities between Rosehedge and Sterett respecting their chattel mortgages, the challenged portion of the District Court's Order is clearly erroneous.

The Record discloses that while Sterett was given Notice of Sale [R. 68-69, 132, 133] she was neither present or represented thereat, nor objected to its confirmation at any time prior to the filing of Referee's Order Confirming Sale on September 23, 1957 [R. 110, 117]. No adversary, or other proceedings, between Rosehedge and Sterett, either at the sale or thereafter, was ever held before the Referee, involving any issue relating to their rights and priorities of their respective chattel mortgages, or upon the question whether the Rosehedge lien claim or its chattel mortgage were satisfied or extinguished in favor of Sterett by the S. Kohn bid and sale. Sterett's Petition on Review [R. 75-81] contains *no* grounds for review, and *no* specification of error challenging the Referee's Order upon such grounds, nor did it present any such question for or upon review. Such issue and question was *first raised by Sterett in her Memorandum of Law served and filed at the time of the Review hearing* [R. 124-126].

The Petition on Review cannot be enlarged or aided by briefs on file. (*In re Ainsworth*, 5 Fed. Supp. 523, 524.) No evidence upon that issue was presented either before the Referee or District Court.

The District Court, in reviewing a Referee's Order is *limited* to the Record before the Referee, and cannot accept arguments by, or statements of counsel as evidence. (*In re Paley*, 26 Fed. Supp. 952.) Evidence not taken or admitted before the Referee *cannot be considered*. (*In re Panamer Rlty. Corp.*, 54 Fed. Supp. 656.) Obviously no notice of hearing was given to appellant *upon those issues*; Appellant was never presented with *any pleading* upon those issues, nor was it given any notice of hearing, or any hearing, upon such issues. Those issues were *first raised at the hearing* [R. 124-126]. It is, therefore, crystal clear that the District Court, upon review, in summarily determining the rights and priorities between Rosehedge and Sterett deprived Rosehedge of its chattel mortgage, *without due process of law*, and by so doing it committed reversible error.

It is fundamental that a lienholder cannot be divested of his lien without notice and an opportunity to be heard and present evidence upon such issue in support of his claim and lien. (*In re Wachtel*, 64 Fed. Supp. 229; *Coates v. Maguire Oil and Ref. Corp.*, 47 Cal. App. 2d 275, 279, 117 P. 2d 898; 6 *Rem. on Bkcy.* (6th Ed.), 119, 120; *Sylvan Beach v. Koch*, 140 F. 2d 852, 861.)

The foregoing rule is succinctly stated in *Coates v. Maguire, supra* (p. 279), wherein the Appellate Court of California states:

“Even if the bankrupt had been the mortgagor instead of the mortgagee and the mortgaged property had been possession of the bankrupt on adjudication, still the court *could not have affected the lien without notice and hearing to the lienholder*. . . . The reason

for the rule is obvious. *Nothing short of notice and hearing is due process, and due process is required in a bankruptcy court as well as in a court of general jurisdiction.* It is unnecessary to refer to the cases in the subject in detail, but see *In re De Fatta*, 10 F. Supp. 375; *In re Platteville Foundry & Machine Co.*, 147 F. 828; 7 C. J., sec. 307, note 33; 8 C. J. S. sec. 311, notes 81, 82." (Italics ours.)

In re Wachtel, *supra*, upon Trustee's Petition, and mortgagee's answer thereto, the Referee invalidated mortgagee's chattel mortgage, without any hearing or any presentation of evidence and based his ruling solely upon bankrupt's testimony at the first meeting of creditors. Upon review, this was reversed. The Court stated: "However, he (mortgagee) is entitled to a hearing at which witnesses are produced. Such a hearing should be had."

The Court in *Sylvan Beach v. Koch*, *supra*, states:

"In the absence of (1) notice to a party of the claim made against him, and (2) of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity."

Since the question of merger of lien and extinguishment of mortgage debt is dependent upon the question of intent—the intent of the mortgagee—which not only is a question of law, *but also a question of fact*, Rosehedge was entitled to be served with pleadings properly presenting those issues and with notice of hearing, and given an opportunity to be heard and to present its evidence, and the law upon such issue. No such pleadings, notice, hearing, or opportunity was accorded it. The summary determination by the District Court on Review, *as a matter of law*, clearly is erroneous. It not only deprived appellant Rosehedge of its chattel mortgage lien without due process of law, but the District Court was without authority to

determine such issue, particularly upon a Review, which did not include or cover such issue.

The challenged portion of the District Court's Order is clearly erroneous, and should be reversed, and stricken from the other portions of said Order.

Conclusion.

We respectfully submit that the Record is replete with prejudicial reversible error which materially affects Appellant to its prejudice. We, therefore, respectfully submit that that certain portion of the District Court's Order, from which Appellant has appealed, and which is more particularly set forth in its Notice of Appeal [R. 139-141] and on pages 1 and 2 of this Brief, should be reversed, and such portion should be stricken from said District Court's Order, and that Appellant recover its costs of appeal herein.

Respectfully submitted,

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No. 15915

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Properties

MOULIN ROUGE, INC., a corporation and successor in interest to
MOULIN ROUGE, a limited partnership,

Bankrupt.

In the Matter of

MOULIN ROUGE, a Limited Partnership,

Bankrupt.

ROSEHEDGE CORPORATION, a corporation,

Appellant,

vs.

MILLIE STERETT,

Appellee.

APPELLEE'S OPENING BRIEF.

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FILED

JAN 12 1959

PAUL P. O'BRIEN, CLERK

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Appellee.

APPELLEE'S OPENING BRIEF.

Statement of the Case.

A. The Parties.

Appellee is a secured creditor of Moulin Rouge, a limited partnership, bankrupt, under a chattel mortgage of certain personal property situated in the Moulin Rouge Hotel, Las Vegas, Nevada, which mortgage was executed July 5, 1955 and recorded July 13, 1955 to secure a promissory note in the amount of \$35,000.00. [R. 11-12, 21-29.]

Appellant also claimed to be a secured creditor of said bankrupt by virtue of a \$195,000.00 loan secured by

(a) an assignment and pledge of a certain \$600,000.00 Edna Shulman promissory note, (b) an assignment and pledge of a deed of trust securing said Edna Shulman promissory note on the land upon which the Hotel Moulin Rouge was subsequently erected, both of which promissory note and deed of trust were subject to a prior assignment and pledge to Leroy Investment Company, Inc., a California corporation, hereafter referred to as "Leroy", and (c) a chattel mortgage dated May 24, 1954 and recorded May 25, 1955 on substantially the same personal property which is the subject of appellee's chattel mortgage. [R. 10-11.]

B. Foreclosure Proceedings.

Upon the bankrupt's default in payment of the promissory notes in favor of appellant and Leroy, said parties commenced foreclosure actions against the Moulin Rouge realty on their respective pledges of the Edna Shulman promissory note and deed of trust. *No action was taken to foreclose appellant's chattel mortgage.**

On October 19, 1955, said Moulin Rouge, a limited partnership, commenced proceedings under Chapter XI of the Bankruptcy Act. Thereafter, the referee in bankruptcy stayed the pending foreclosure actions. [R. 91-92.]

On January 17, 1956, appellant and Leroy filed motions for leave to proceed with sale under the Edna Shulman pledge and trust deed. After hearings on objections thereto, the matter was submitted to the referee for decision. [R. 92.]

Thereafter, the trustee in bankruptcy petitioned the referee for authority to sell the real property encumbered

*All emphasis in this brief is added.

by the Edna Shulman deed of trust "free and clear of all liens." Appellant and Leroy objected to said petition unless a stipulation proposed by them was approved by the referee. Subsequently on July 6, 1956, the referee granted the trustee's petition, approved and incorporated said stipulation into the order and directed the sale of the real property, including "the furniture, fixtures and other personal property contained therein. . . ." [R. 3-7, 99-102.]

Appellant and Leroy had informed both the referee and the trustee in bankruptcy that *they desired to bid at any sale and to utilize the value of their lien claims upon such bids and in payment of the purchase price if they were successful bidders.* [R. 97.] In accordance with this desire, the stipulation provided that upon the trustee's sale, appellant and Leroy, jointly and severally, could bid and become the purchaser thereof, and that they were entitled to use on account of such bids the amount of their respective claimed indebtedness. [R. 60.]

The stipulation further provided that appellant and Leroy had the right to include, principal, interest, attorneys' fees and all sums paid out or incurred by them, or either of them, for the protection or preservation of said real property "as a credit upon, and as payment upon the said purchase price of the property purchased." [R. 60-61.]

C. The Sale.

The trustee's sale took place on September 6, 1957 in accordance with the provisions of the referee's order of July 6, 1956. Appellant and Leroy were the highest bidders. For convenience, the bid was made in the name of S. Kohn, a secretary in the office of Mr. Katz, at-

torney for appellant and Leroy. However, the bid was in fact the bid of appellant and Leroy and was regarded by all parties and the referee as such. [R. 110-111, 117-118, 121-122.]

At the time the referee accepted said bid, he granted the motion of appellant and Leroy for leave to proceed with their sale under the Edna Shulman pledge and trust deed, and he also upheld the validity of the claims of appellant and Leroy as first liens against the real property of bankrupt. [R. 37-44.]

In announcing the bid, the attorney for appellant and Leroy stated:

"We do have an offer that we desire to submit, and our offer is, in effect, to pay the equivalent of roughly five hundred sixty or six hundred thousand dollars, and the reason I say roughly is because the exact amount would follow the court's determination of what fees would be allowed on these in connection with the foreclosure of the trust deed, and that would be made up as follows. . . ." [Tr. of Sept. 6, 1957, p. 10.]

During the proceedings, the referee stated:

"There is a lot of technical terminology that might not be clear when you hear it read. What the offer in essence is is that Mr. Katz is bidding in the trust deeds held by Rosehedge (appellant) and Leroy, and he also is paying an additional one hundred sixteen thousand. That one hundred sixteen thousand will go to pay expenses of administration." [Tr. of Sept. 6, 1957, p. 15.]

The referee stated at the sale and found that appellant and Leroy bid in the amount of the encumbrances held by them plus an additional \$116,000.00. [R. 117-118, 120; Tr. of Sept. 6, 1957, p. 15.]

The referee's above findings in this respect are contained in his Certificate on Petitions for Review as follows:

"It appears that under the Stipulation of June 19, 1956, and the Referee's Order of July 6, 1956, *Leroy and Rosehedge* (appellant) *were permitted to utilize, in whole or in part, the amount of their lien claims in connection with any bid made by them, or purchase price to be paid by them.* The bid by Mr. Katz on September 6, 1957, in the name of S. Kohn was announced as, and, in fact, was the bid of and on behalf of Leroy and Rosehedge, and was so considered and treated by the Referee, and all persons present at said sale. This bid was made subject to the liens and claims of Leroy and Rosehedge. *This, in the opinion, of the Referee, at the time of sale, was the equivalent of utilizing the value of the Leroy and Rosehedge claims upon the bid made.* Had the bid been increased by the value of such lien claims, a credit upon the purchase price in the amount of the value of the said lien claim would have had to be given. Such procedure would have been a useless and idle act." [R. 117.]

At no time did appellant object to the manner in which the referee regarded said bid and no petition for review of any referee's order was filed by appellant.

The principal asset of the bankrupt was the land encumbered by the \$600,000.00 Edna Shulman deed of trust and the Hotel Moulin Rouge erected thereon. [R. 96.]

The record does not reflect the exact value of the land and the Hotel Moulin Rouge at the time of the bid. However, the liabilities of the bankrupt exceeded \$2,-100,000.00 to secured and unsecured creditors, and the sale to appellant and Leroy reduced by more than \$820,-

000.00 the amount of lien claims, exclusive of chattel mortgages and conditional sales contracts. [R. 3-20, 93-94.]

At the time of the sale, appellant and Leroy bid in the sum of \$116,000.00 plus the amount of their respective liens. The principal of appellant's loan had been reduced to \$126,928.66 and its total lien claim including interest, costs and attorneys' fees, was \$154,846.65. The total sum claimed by Leroy, including interest, costs and attorneys' fees was \$272,722.50 and the total of both lien claims was \$427,569.15. [R. 37-41.]

Thus, appellant and Leroy acquired the Hotel Moulin Rouge, and the land upon which it was situated, the principal asset of the bankrupt, for less than 25% of the bankrupt's outstanding indebtedness, of which the greatest part of their bid was used in satisfaction of their own secured liens. As a result, of all secured and unsecured creditors of bankrupt, only two were satisfied in full—appellant and Leroy.

Although both the referee and appellant regarded the bid as utilizing the entire amount of appellant's lien claim, the referee made no finding with reference to appellant's chattel mortgage of record, which was additional security for appellant's claimed indebtedness.

D. First Petition for Review.

Appellee joined in the filing of a petition for review of the referee's order of September 6, 1957 and principally urged that the referee's failure to act in respect of appellant's chattel mortgage had prejudiced her. [R. 50-56.]

E. Confirmation of Sale.

On September 23, 1957, the referee confirmed the sale to appellant and Leroy, ordering conveyance of the bankrupt's real property and personal property, subject to all

valid and subsisting conditional sales contracts and chattel mortgages. The referee did not specifically rule upon the ground in appellee's petition for review that her chattel mortgage was superior to that of appellant. [R. 66-75.]

F. Second Petition for Review.

Appellee then petitioned for review of the referee's order of September 23, 1957, incorporating by reference her earlier petition for review and realleging her earlier contention with respect to appellant's chattel mortgage. [R. 75-81.]

G. The District Court.

At the hearing before the District Court, it was urged that appellant's claim had been satisfied in full by utilizing the amount of said claim in making the bid on the real property, and that although appellant's claim was doubly collateralized, it was entitled to only one satisfaction and thus had no further claim under its chattel mortgage. [R. 124-127.]

Although the District Court dismissed appellee's petition for review, denied the relief sought by her therein, and overruled each of appellee's objections to the referee's order, it nevertheless ordered appellant to deposit in escrow a release of its chattel mortgage without prejudice to the rights of appellant to assert any claims or defenses, against appellee's chattel mortgage, except the claim of priority. Thus, the District Court impliedly found that appellant had bid in at the sale the amount of its lien claim, that its claimed indebtedness had been extinguished and that accordingly appellant had no further rights under its chattel mortgage. [R. 135-136.]

From the portion of the order requiring appellant to deposit a release of its chattel mortgage in escrow, this appeal has been brought. [R. 139-140.]

Summary of Argument.

1. The District Court ruled properly in ordering appellant to release its chattel mortgage through escrow because appellant's lien claim was satisfied and extinguished by utilizing the entire value of said claim in its bid for the bankrupt's real property.

2. The District Court had jurisdiction to order appellant to release its chattel mortgage through escrow.

I.

The District Court Ruled Properly in Ordering Appellant to Release Its Chattel Mortgage Through Escrow Because Appellant's Lien Claim Was Satisfied and Extinguished by Utilizing the Entire Value of Said Claim in Its Bid for the Bankrupt's Real Property.

A. The Evidence and Law Support the Order of the District Court.

The principal issue of this appeal is whether appellant's chattel mortgage lien claim has been satisfied and extinguished by reason of having utilized the entire value of its lien claim in its successful bid for the Moulin Rouge realty. If the entire value was utilized, then appellant's indebtedness was satisfied, its lien extinguished and the order of the District Court should be affirmed.

Appellant and Leroy were the assignees of a deed of trust, which constituted the first lien on the Moulin Rouge realty. [R. 37-44.] They were also the successful bidders at the sale of September 6, 1957 for the purchase of said real property.

Generally, the acquisition of mortgaged premises by the mortgagee results in a merger of the two estates, vesting the mortgagee with complete title, and ending his rights under the mortgage.

59 C. J. S. 672.

However, whether conveyance to a mortgagee of property covered by the mortgage results in merger of the fee and mortgage, is a question of the intention of the parties and depends upon the facts and circumstances of the particular case.

Guaranty Trust Co. of N. Y. v. Minneapolis & St. Louis R.R. Co., 36 F. 2d 747, 764 (8th Cir., 1929), cert. den., 281 U. S. 756;

Toston v. Utah Mortgage Loan Corp., 115 F. 2d 560, 562 (9th Cir., 1940);

59 C. J. S. 673, 677.

Contrary to the position taken by appellant in its opening brief, the evidence and the law clearly support the order of the District Court and its implied finding that appellant's lien claim was satisfied and extinguished by merger. The evidence is summarized as follows:

1. In announcing the bid of appellant and Leroy, the attorney for said parties stated as follows:

"We do have an offer that we desire to submit, and our offer is, in effect, to pay the equivalent of roughly five hundred sixty or six hundred thousand dollars, and the reason I say roughly, is because the exact amount would follow the court's determination of what fees would be allowed on these in connection with the foreclosure of the trust deed, and that would be made up as follows. . . ." [Tr. of Sept. 6, 1957, p. 10.]

2. During the proceedings, the referee made it clear that appellant and Leroy were bidding in the full amount of their lien claims as follows:

“There is a lot of technical terminology that might not be clear when you hear it read. *What the offer in essence is is that Mr. Katz is bidding in the trust deeds held by Rosehedge (appellant) and Leroy, and he also is paying an additional one hundred sixteen thousand. That one hundred sixteen thousand will go to pay expenses of administration.*” [Tr. of Sept. 6, 1957, p. 15.]

3. Appellant and Leroy had both informed the referee and trustee in bankruptcy that they desired to bid at the sale and *to utilize the value of their lien claims upon such bids and in payment of the purchase price if they were the successful bidders.* [R. 97.]

4. The stipulation proposed by appellant and Leroy and incorporated in the referee's order of July 6, 1956, provided that appellant and Leroy could use the full amount of their claimed indebtedness as a credit and payment upon the purchase price of the real property of bankrupt. [R. 60-61.]

5. At no time did appellant attempt to foreclose or otherwise enforce its chattel mortgage. Its only action was relative to the bankrupt's real property.

6. There were no intervening liens on the real property or the Hotel Moulin Rouge, which constituted the principal asset of the bankrupt. The referee's order as confirmed by the District Court wiped out all other liens against said real property. Thus, appellant and Leroy acquired the principal asset of bankrupt free and clear of all liens. [R. 3-20, 33-49, 66-67.]

7. The value of the real property acquired by appellant and Leroy was greater than the amount of their combined claimed indebtedness, resulting in merger of the mortgage with the fee and extinguishment of the debt.

Central Hanover Bank v. Roslyn Estates, 42 N. Y. S. 2d 130 (1943), aff'd 293 N. Y. 680, 56 N. E. 2d 595.

The total lien claim of appellant and Leroy was \$427,-569.15 including principal, interest, costs, and attorneys' fees. At the sale of September 6, 1957, appellant and Leroy acquired the principal asset of the bankrupt, namely, the Hotel Moulin Rouge and the land upon which it was erected. The land alone was encumbered by a \$600,-000.00 deed of trust, which deed of trust was pledged and assigned to appellant and Leroy and bid in by them at the sale. The liabilities of bankrupt exceeded \$2,100,000.00 to secured and unsecured creditors and the referee wiped out the rights of lien claimants of record, excluding chattel mortgages and conditional sales contracts, in excess of \$820,000.00. Obviously, appellant and Leroy have obtained assets worth many times the amount of their combined lien claims. [R. 3-20, 37-41, 93-94, 96.]

It was argued to the District Court upon the hearing on the petitions for review that appellant was only entitled to be paid once although its claim was secured by both a chattel mortgage and a trust deed. [R. 124-127.] The District Court agreed and ordered appellant to release its chattel mortgage. The position of District Court is clearly supported by law.

The courts have uniformly held that a mortgagee is entitled to be paid in full *but is not entitled to receive more than the total amount of the mortgaged debt.*

Honeyman v. Jacobs, 306 U. S. 539, 542 (1939);
Gelfert v. National City Bank, 313 U. S. 221, 223 (1941).

In the *Honeyman* case, the United States Supreme Court stated on page 542 as follows:

“The contract contemplated that the mortgagee should make itself whole, if necessary, out of the security, *but not that he should be enriched at the expense of the debtor or realize more than what would repay the debt with the costs and expenses of the suit.*”

In *Guaranty Trust Co. of N. Y. v. Minneapolis & St. Louis R.R. Co.*, 36 F. 2d 747 (8th Cir., 1929), cert. den., 281 U. S. 756, cited by appellant in its opening brief, the court found that there was no merger by virtue of an express agreement between the parties. The court further stated on page 764 as follows:

“Any other conclusion would work a manifest injustice to the Northern Pacific Company. *There is no claim that the property was worth more than the Northern Pacific paid for it.* It parted with its money, which it would lose to the junior lien holders, if they can now come in and assert priority of their liens.”

It is obvious that to pay appellant twice would be manifestly unjust.

8. The referee found as a fact that appellant and Leroy utilized the value of their claims upon the bid made at the sale of September 6, 1957. [R. 117.]

Although said finding was not separately demarcated as such, it was set forth in the referee's certificate on petitions for review and had the full force and effect of a formal finding under Section 39(a)(8) of the Bankruptcy Act, 11 U. S. C. A., Sec. 67(a)(8), which provides that the referee shall:

“Prepare promptly and transmit to the clerks certificates on petitions for review of orders made by them, together with a statement of the questions presented, the *findings*, and orders thereon, the petition for review, a transcript of the evidence or a summary thereof, and all exhibits.”

This finding that appellant and Leroy actually bid in the entire amount of their respective lien claims at the sale of September 6, 1957, could not be reversed by the District Court unless clearly erroneous.

General Bankruptcy Order 47.

However, the referee's order was subject to control of the District Court, except only as to vested rights which may have accrued under it, and could be corrected if found to be erroneous or modified to suit the facts or vacated and set aside.

11 U. S. C. A., Sec. 11(a)(10);

General Bankruptcy Order 47.

In re Sparta Canning Co., 73 F. 2d 732, 733 (7th Cir., 1934);

2 Remington on Bankruptcy (6th Ed.) 579.

Accordingly, since the referee found that appellant and Leroy had utilized the entire amount of their lien claims upon their bid but did nothing about appellant's chattel mortgage of record, the District Court had the right to order appellant to release said chattel mortgage. Thus, the ruling of the District Court was proper.

B. Appellant's Arguments Do Not Warrant Reversal of the District Court's Order.

Appellant makes the following arguments in its opening brief in support of its contention that its lien claim and chattel mortgage were not satisfied nor extinguished by the bid and sale:

First, appellant urges that the referee improperly found in its certificate on review that appellant and Leroy had utilized the value of their lien claims upon the sale and bid and also that no such finding was made. (Appellant's Op. Br. pp. 56-58.)

In support of this contention, appellant cites *In re Peoria Braumeister Co.*, 138 F. 2d 520 (7th Cir., 1943). However, there the referee attempted to change formal findings in his certificate on review. In the instant action, there were no formal findings except as set forth in the referee's certificate on review. Moreover, in *Peoria Braumeister*, appellant made a motion to strike the petition for review directed to the District Court. Appellant did not make such motion in the instant action.

Finally, the finding by the referee in the instant case was in accordance with Section 39(a)(8) of the Bankruptcy Act, 11 U. S. C. A. Section 67(a)(8), and with General Bankruptcy Order 47.

Second, appellant urges that the recital in the bid that the real property was acquired subject to the liens of appellant and Leroy established as a matter of law that there was no intention to merge the mortgage with the fee. (Appellant's Op. Br. pp. 59-60.)

However, appellant ignores the rule of law that merger is a question of intent and that intent is a question of

fact; that the form of the bid does not control its substance and is at best an indicia of intent.

Moreover, the cases cited by appellant do not support its position. In *Anglo California Bank v. Field*, 146 Cal. 644, 652 (1905), the court determined that there was no intent to merge as a matter of fact. *Monheit v. Cigna*, 28 Cal. 2d 19 (1942), involved a tax lien and is not apposite to the question involved in the instant case.

In *Philadelphia Savings Fund Society v. Stern*, 23 A. 2d 413 (1942), cited by appellant, the court held on page 415 as follows:

“ . . . a mortgagee's acquisition of title to mortgaged property by a conveyance under and subject to the mortgage does not operate *automatically and inexorably* to extinguish the personal liability to the mortgagor for the debt secured. *Whether or not it has such an effect depends upon the intention of the parties to the conveyance. . . .*”

Thus, merely because the bid stated that it was subject to the liens of appellant and Leroy did not of itself prevent a merger in this case, as it is overall intent which governs.

Third, appellant next argues that a merger does not result from a conveyance or transfer of the equity of redemption to an agent or trustee of the mortgagee. Thus, appellant urges since the bid was in the name of S. Kohn, there could be no merger. (Appellant's Op. Br. pp. 60-63.)

However, all of the cases cited by appellant are based upon the premise that the intention of the parties controls whether there was a merger, and that one of the elements of intention is whether title was taken in the name of an agent or trustee. In the principal cases relied upon by

appellant, the record established a relationship of agent or trustee. There is no such relationship established in the instant action which unequivocally shows that the bid was in fact that of appellant and Leroy, but made only for convenience in the name of S. Kohn, a secretary of the attorney for said bidders. [R. pp. 110-111, 117-118, 121-122.] Moreover, both the referee and the District Court found an intent to merge.

Finally, appellant urges the theory of intervening liens in support of its position that a merger did not take place. (Appellant's Op. Br. pp. 63-65.)

Although appellant asserts the intervening lien theory, it does not cite any case involving facts similar to those of the instant action. The principal assets of the bankrupt were the land and the Hotel Moulin Rouge. There were no intervening liens on said assets which could prejudice appellant upon any merger, because the sale was free and clear of all liens. Thus, with reference to the principal assets acquired by the sale, there could have been no objection to a merger and neither appellant nor Leroy interposed any such objection, nor have they filed any petitions for review of the referee's orders thereon.

Finally, even if there were intervening liens, this would be only one element of intent. The bid could have provided that merger was not intended. The implied finding of the referee and the District Court was that a merger took place. The facts clearly support such a finding.

II.

The District Court Had Jurisdiction to Order Appellant to Release Its Chattel Mortgage Through Escrow.

A. The District Court Properly Modified the Referee's Order.

Appellant has raised a number of procedural points in its appeal, relating to the insufficiency of appellee's petition for review, her right to review and the power of the District Court to determine an independent controversy between the parties to this appeal.

However, none of these procedural questions have any bearing upon this appeal.

On September 6, 1957, the referee ruled that appellant's lien was valid. Appellant bid in the amount of said lien to purchase the real property of bankrupt. [R. 37-44.] On September 23, 1957, the sale to appellant and Leroy was confirmed by the referee. [R. 66-75.] Appellee filed her petitions for review of both orders of the referee.

At the hearing on appellee's petitions for review before the District Court, it was argued that the lien claim of appellant had been satisfied in full by utilizing the amount of said claim in bidding on the real property at the sale of September 6, 1957. Thus, it was urged that since appellant was entitled to only one satisfaction, it had no further claim under its chattel mortgage. [R. 124-127.]

Although the District Court specifically dismissed appellee's petitions for review, denied her the relief sought under said petitions and overruled all of her objections to the referee's orders, it nevertheless modified the referee's order of September 23, 1957, and ordered appellant to

deposit a release of its chattel mortgage in the escrow opened for purchase of the bankrupt's real property. [R. 135-136.]

Appellant cites no authority and makes no argument in its opening brief that the District Court did not have jurisdiction to modify said referee's order.

It is clear that under Bankruptcy Act, Section 2(10), 11 U. S. C. A., Section 11(10), the District Court had the right and power to

“consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified”

by the referee.

Moreover, under Section 2(2) of the Bankruptcy Act, 11 U. S. C. A., Section 11(2), the District Court was given the power to:

“allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates.”

Furthermore, under Section 57(k) of the Bankruptcy Act, 11 U. S. C. A., Section 93(k),

“claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part according to the equities of the case. . . .”

In 8 Remington on Bankruptcy (6th Ed.) 295, it is stated, that:

“Regardless of the right to demand review of a referee's order, *it is thoroughly established that the district judge can proceed to review such orders on his own initiative if he sees fit to do so*; therefore, it is immaterial whether the judge has a clear right

to review or not, if the judge sees fit to entertain the application. This power stems from the inherent power of the court and from Sec. 2(a)(10) of the Bankruptcy Act. . . .”

In 2 Remington on Bankruptcy (6th Ed.) 579, it is stated that:

“As to scope of review, the judge in reviewing an order of the referee, is not confined to a consideration of the latter’s certificate but may consider any point presented by the record.”

In *Evarts v. Eloy Gin Corp.*, 204 F. 2d 712, 716 (9th Cir., 1953), cited by appellant in its opening brief, the court stated that the bankruptcy court has summary jurisdiction in

“. . . all matters of administration, such as allowance, rejection and reconsideration of claims . . . determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course. . . .”

In *Columbia Gas & Electric Corp. v. United States*, 153 F. 2d 101 (6th Cir., 1946), *cert. den.* 329 U. S. 737, the court stated on page 101 that the Supreme Court has

“. . . recognized also that the equity powers of the bankruptcy court may be exerted to subordinate the claims of one claimant to those of others of the same class *where its conduct in acquiring or asserting its claim is contrary to established equitable principles.*”

Thus, it is manifestly clear that the District Court possessed the inherent power to determine that appellant had received full satisfaction of its claim, that it was equitable that it be satisfied only once, and that it had no further right to retain its chattel mortgage of record, which was formerly additional security for the same claim.

However, appellant urges on pages 46-51 and 66-71 of its opening brief that the District Court had no jurisdiction to determine rights and priorities between appellant and appellee regarding their respective chattel mortgages.

It is true that ordinarily the District Court does not take jurisdiction in controversies between two persons over a matter in which the trustee in bankruptcy has no interest. There is an exception in cases involving reorganizations.

In re Burton Coal Company, 126 F. 2d 447, 448 (7th Cir., 1942).

However, in *Pepper v. Litton*, 308 U. S. 295 (1939), the court stated on pages 304 and 305 as follows:

“By virtue of Section 2, a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the act, it applies the principles and rules of equity jurisprudence . . . among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto; the rejection in whole or in part ‘according to the equities of the case’ of claims previously allowed . . . in such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. . . .”

“The bankruptcy courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done. By rea-

son of the express provisions of Section 2, these equitable powers are to be exercised on the allowance of claims, . . .”

Bank of America v. Erickson, 117 F. 2d 796 (9th Cir., 1941), decided by this court is directly in point. There, certain creditors entered into an agreement to subordinate their claims. The trustee in bankruptcy objected to allowing the claim of said creditors on a parity with the general creditors, because of said subordination. The referee ordered the claims subordinated. Appellant argued that there was a justiciable controversy growing out of the agreement to subordinate between it and the other creditors, that the bankruptcy court was without jurisdiction to determine the dispute, and that the matter should be heard in another forum. The court stated on page 798 as follows:

“The argument finds little support in the authorities. *The bankruptcy court has undoubted power to subordinate a general claim to other claims in the same category where for any reason, legal or equitable it ought to be subordinated.*”

See also:

Heiser v. Woodruff, 327 U. S. 726 (1945);

Wheeling Valley Coal Corp. v. Mead, 171 F. 2d 916 (4th Cir., 1949);

Woodruff v. Heiser, 150 F. 2d 873 (10th Cir., 1945), cert. den. 326 U. S. 778;

In re International Power Securities Corp., 170 F. 2d 399 (3rd Cir., 1948).

In the instant action, the District Court did not rule that appellee's chattel mortgage was valid and subsisting nor did it decide a controversy between appellant and

appellee. It merely ordered that appellant deposit a release of its chattel mortgage in escrow, thus, impliedly holding that appellant's lien claim had been fully satisfied by virtue of its bid at the sale of September 6, 1957. Moreover, the District Court specifically ordered that the release of appellant's chattel mortgage was *without prejudice to its right to interpose all claims and defenses to appellee's chattel mortgage*, except the defense of priority. Of course, since the District Court found that appellant's lien claim had been satisfied, the chattel mortgage had no further priority. [R. 135-136.]

The District Court did not decide a controversy between appellant and appellee. It determined in the exercise of its proper jurisdiction to allow, disallow, reject or subordinate claims, that appellant's lien claim had been satisfied and thus should be released. Appellant has offered no authority holding that such a ruling was beyond the District Court's power.

B. The Appellant's Procedural Arguments Do Not Warrant Reversal of the District Court's Order.

However, even if the District Court had granted appellee's petitions for review, the procedural arguments raised by appellant would not warrant reversal of the order:

First, appellant argues on pages 36-39 of its opening brief that appellee was not a person aggrieved, and had no right to seek review of the referee's order because the sale of the personal property was subject to chattel mortgages and conditional sales contracts.

Section 39(c) of the Bankruptcy Act, 11 U. S. C. A., Sec. 67, grants the right to review referee's order to "a person aggrieved." The act does not define who are aggrieved persons.

However, in *Rogers v. Bank of America*, 142 F. 2d 128 (9th Cir., 1944), cited by appellant, this Court defines who is *not* aggrieved. The Court stated on page 129 as follows:

“The bank has filed no claim in the bankruptcy proceedings; it does not occupy the status of a creditor or lienor. It is a stranger to those proceedings and therefor cannot be considered a ‘person aggrieved.’ ”

It is obvious that the *Rogers* case is not authority for appellant’s position in the instant action because appellee was a creditor of the bankrupt and also a lienor, by virtue of her chattel mortgage. [R. 21-29.] Moreover, in none of the cases cited by appellant, is the factual situation analogous to the instant proceedings. Here, the failure of the referee to provide in his order that appellant’s chattel mortgage was extinguished, clearly imposed a burden upon appellee, diminished her property and detrimentally affected her claim.

The court, in *In re Camp Packing Co.*, 146 Fed. Supp. 935, 938 (N. D. N. Y., 1956), also cited by appellant in its opening brief, held a secured creditor was an aggrieved person, and stated as follows on page 938:

“Reported decisions do not seem to contain an all inclusive definition of the term ‘a party aggrieved’ as used in the applicable statute . . . it would seem that a review is authorized if the party petitioning for same shows that *his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed.*
.”

Because of the merger in this proceeding, the failure of the referee to extinguish appellant’s chattel mortgage

detrimentally affected appellee's rights and made her aggrieved.

Second, appellant urges on pages 40-43 of its opening brief, that appellee is estopped to review the referee's order.

The referee's certificate on review set forth that appellee was estopped to petition for review. [R. 120.]

However, estoppel is generally a question of fact.

Quon v. Niagara Fire Insurance Co., 190 F. 2d 257 (9th Cir., 1951);

Parke v. Franciscus, 194 Cal. 284, 297 (1924);
18 Cal. Jur. 2d 413.

Thus, had the District Court found that appellee was not estopped, it would have ruled upon a factual question, which this court would not disturb on appeal. Appellant has cited no cases where the Court of Appeals has reversed a District Court finding of no estoppel.

Moreover, appellee should not be estopped because she *did* present her contentions prior to the referee's order of September 23, 1957, confirming the sale. Appellee's position was presented to the referee by her petition for review of the order of September 6, 1957. [R. 50-56.] This was rejected by the referee. [R. 66-75.] Thus, appellee should not be estopped.

Third, appellant asserts on pages 43-45 of its opening brief that appellee's petition for review was insufficient.

However, the District Court had the inherent power to grant appellee's petition, even if it was defective.

Bankruptcy Act, Sec. 2(a)(10), 11 U. S. C. A.,
Sec. 11(a)(10);

In re Moscovitz, 63 Fed. Supp. 1000 (W. D. Ky.,
1946);

In re Florsheim, 24 Fed. Supp. 991 (S. D. Cal.,
1938), app. dism'd 110 F. 2d 660 (9th Cir.,
1940);

8 Remington on Bankruptcy (6th Ed.), 295;

2 Collier on Bankruptcy (14th Ed.), 1479.

In the *Florsheim* case, the court stated on page 992 that:

"where a petition for review is clearly erroneous . . . the court may decide to pass upon points not specifically designated . . . or it may dismiss the petition."

Thus, even if defective, the District Court clearly could have ruled upon appellee's petition. Appellant has cited no case where an Appellate Court has reversed the District Court after it had considered a defective petition for review.

Conclusion.

The order of the District Court should be affirmed.

Respectfully submitted,

ARTHUR N. GREENBERG,

Attorney for Appellee.

No. 15915

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Properties

MOULIN ROUGE, INC., a corporation and successor in interest to
MOULIN ROUGE, a limited partnership,

Bankrupt.

In the Matter of

MOULIN ROUGE, a Limited Partnership,

Bankrupt.

ROSEHEDGE CORPORATION, a corporation,

Appellant,

vs.

MILLIE STERETT,

Appellee.

APPELLANT'S SUPPLEMENTAL AND REPLY BRIEF.

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FILED

SEP 14 1959

PAUL P. O'BRIEN, CLERK

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I.

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No. 15915
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of the Properties
MOULIN ROUGE, INC., a corporation and successor in interest to
MOULIN ROUGE, a limited partnership,
Bankrupt.

In the Matter of
MOULIN ROUGE, a Limited Partnership,
Bankrupt.
ROSEHEDGE CORPORATION, a corporation,
Appellant,
MILLIE STERETT, *vs.*
Appellee.

**APPELLANT'S SUPPLEMENTAL AND REPLY
BRIEF.**

Preliminary Statement.

After Appellant's Opening Brief was filed, Appellee's application to supplement to record was granted¹ to include the Reporter's Transcript of the proceedings and sale held before the Referee on September 6, 1957. The matter was then remanded to the District Court for correction of indicated differences regarding such transcript.

Appellee's brief, filed herein, includes the supplemental record, but before its correction.

Appellee's Brief, we submit, noticeably has failed to answer, or refute the contentions, arguments and authorities presented in Appellant's Opening Brief. In certain instances Appellee's Brief incorrectly states the record. On other occasions it makes statements unsupported by

¹Order dated December 10, 1958, and Order dated February 18, 1959.

or contrary to the record. It contains partial, incomplete or isolated quotations from the record, which when completed, or taken in their true context, convey a meaning different than that asserted by Appellee. These will be alluded to subsequently.

Supplemental Briefs are permitted herein. Pursuant to Order of this Court Appellant is combining its Supplemental and Reply Brief.

This Court's Order, dated December 10, 1958 (supplementing the record herein) was made "subject to the qualification that this Order is not to be construed as a determination or adjudication as to whether the portions so added by Appellee are relevant or material to the appeal."

This Court, by Order dated February 18, 1959, remanded the cause to the District Court for correction of the supplemental record, with authority to refer the matter to the Referee, for advice and assistance. Said Order also provided, "if as a result of the proceedings herein authorized there is added to the record matters not theretofore brought to the notice of the District Court, the latter shall reconsider its Orders now under review in this Court, with or without further hearing, and confirm or modify the same, or vacate such Orders, and enter new Orders herein, subject to review in this appellate cause on the present record and briefs as appropriately supplemented."

The record was settled before the Referee, who made the following corrections and additions to the Reporter's Transcript of September 6, 1957:

1. The word "two" found on page 26, line 20 of said Transcript was changed to read "ten."
2. The word "stipulation" found on page 14, line 8, of said Transcript was changed to read "written bid."
3. On page 21, immediately following line 9 of the aforesaid Transcript there was added the following:

"That the following proceedings had and the statements made in open court and while the Court was still in session, and before any recess had been taken, to wit:

"Referee: By the way, Mr. Katz, who is S. Kohn?

"Mr. Katz: S. Kohn is a secretary in my office and is making this bid as a matter of convenience."

On May 28, 1959, the District Court made an Order² adopting the Referee's findings and changes, and confirmed its Original Order under review. This later Order, and the record, has been returned to this Court.

To justify its Order, the District Court states:

". . . that after a Notice of Appeal has been filed, this Court completely loses jurisdiction of the cause, except to the extent that the Court of Appeals itself may mandate to this Court some further task in connection with the case on appeal. Orderly Court procedure demands that this rule be rigidly, meticulously and scrupulously observed, for otherwise we should have the unseemingly spectacle of a higher court and a lower court simultaneously sitting in the same case.

"The present task of this Court, therefore, is an extremely narrow one. We are to decide whether, in the light of the three microscopic changes in the Record made by the Referee, this Court's own orders should also be changed.

"To ask the question is to answer it. . . ."

²Appellant took a Review from the Referee's Order upon the ground that correction No. 3 was incomplete, and disregarded the undisputed evidence relating thereto, but the District Judge made his order, without any hearing upon or determination of said Review, and returned the record to this Court. To avoid further delay, Appellant is filing this Brief based upon the record as made by the Referee, and confirmed by the District Court.

The District Court ruled that the three “microscopic” changes were “to minuscule” to warrant any modification, or vacation of the original Order, and confirmed the same. (The District Court ignored the fact that the Reporter’s Transcript had not been certified to and was not before the Court upon Review in October 1957.)

In construing this Court’s Order, the District Court erroneously held that it was *limited solely* to the *three* corrections in the *reconsideration* of its Order under review, and otherwise lacked jurisdiction in the matter. (Actually only a portion of its Order is under review by this Court.) [See R. pp. 137-141.]³

We submit that this Court never intended its Order to be so narrowly limited or construed; rather it intended that the District Court reconsider its Order under review (portion), upon *all* the evidence, *including such evidence not before it when its Order dated November 7, 1957, was made*. This would include the entire Reporter’s Transcript of September 6, 1957, which was neither certified to, nor before it when the Review was determined. [See Typewritten Referee’s Certificate on Review, pp. 46-47; also Reporter’s Certificate in Reporter’s Transcript of September 6, 1957, p. 525, dated October 28, 1957, the same date on which the Review was heard and argued.] Had the District Court reviewed the Reporter’s Transcript it readily would have seen that the “quotation” set out in Appellee’s “Memorandum of Law in Support of Petition for Review of Referee’s Order of September 23, 1957” [R. pp. 124-125], which the District Court used as the basis of the portion of the Order now upon appeal, cannot be found in the Reporter’s Transcript. This factor alone should have caused the District Court to give serious reconsideration to that portion of

³All reference to R, as used herein, refer to the *printed* Transcript of Record.

its Order now under review. It clearly would have demonstrated that the isolated portion of the Referee's Certificate set out in Appellee's "Memorandum" [R. pp. 124-127] was used therein by the Referee *by way of example only, and not as a statement of fact occurring at the sale.*

Furthermore, the Order of remand, restored jurisdiction to the District Court for all purposes set forth in such Order, including the authority to reconsider on the merits that portion of the District Court's Order now upon appeal. (36 C. J. S. Fed. Courts 488; *Gandie v. Porto Rico etc. Co.*, 2 F. 2d 641; *Illinois Bell Telephone Co. v. Slattery*, 98 F. 2d 930, 932; *Union Pac. Ry. Co. v. Johnson*, 249 F. 2d 674, 676.)

The District Court's Order also approved the following Referee's Comment: "this Referee will not recommend to the District Court that any changes be made in the findings heretofore made" relying upon *Kennedy v. United States* (9 Cir.), 115 F. 2d 625, holding that Rule 75(h) gives to the District Court the power to correct the record only as to what occurred, and "not to add or cause to be added to the record findings which were never made." We agree. Appellee was not present either in person or by counsel at the Referee's sale on September 6, 1957, [R. pp. 100, 117, 119, 131, 132; Rep. Tr. p. 2, line 16, to p. 3, line 21].⁴ No adversary, or other proceedings, were had at said hearing between Appellant and Appellee, and no issue was presented to or determined by the Referee involving the priority or validity of their respective chattel mortgages, or pertaining to Appellee's present contention that Appellant's chattel mortgage was satisfied and extinguished by the bid of and sale to S. Kohn. No findings therefore were required upon such matters which were *not* before the Referee, and upon

⁴All references to Rep. Tr. as used herein refer to typewritten Reporter's Transcript of September 6, 1957, before the Referee.

which no adversary proceedings were had. It is axiomatic that in a proceeding to correct the record, the Referee could not make findings upon *matters which never occurred* during, and upon which no issue was presented or determined at the September 6, 1957 hearing and sale; neither could he add to the record "*findings which were never made.*"

The undisputed facts then existing, or which occurred at the September 6, 1957 hearing and sale are set forth in Referee's "Order Confirming Sale" [R. pp. 66-74], and in the District Court's "Order Confirming, Affirming and Approving Referee's Order, Dated September 23, 1957, as Modified by Court." [R. pp. 128-133.] This District Court Order states "that the statements of fact and the recitals of the proceedings had, as set forth in the aforementioned Referee's Order, dated September 23, 1957, are correct, and by reference are made a part hereof. . . ." [R. pp. 130-131.]

In the absence of adversary proceedings before the Referee, or before the District Court upon review, covering disputed questions of fact, these recitals or statements of fact were and are sufficient. (*In re Trinbal*, 55 F. 2d 165; *MacNeal v. Barlen*, 143 F. 2d 230, 232; *In re Hedgeside Distillery Co.*, 123 Fed. Supp. 933; *Simpson Bros. v. Dist. of Columbia*, 179 F. 2d 430, 434; *Huffman, et al. v. Norfolk, etc., et al.*, 71 Fed. Supp. 564.)

Comment on Appellee's Statement of Case.

The Statement of Case in Appellant's Opening Brief, with appropriate record references, we submit, fully, fairly and correctly sets forth the factual matters involved in this appeal. Appellee neither disputes nor denies the same. Appellee's "Statement of the Case" is incomplete and inaccurate. She seeks to justify her contentions by isolated, incomplete quotations taken from the Reporter's Transcript; by inaccurate statements of the rec-

ord, and by reference to matters which *de hors* the record on appeal. We will now review Appellee's Statement of the Case.

Appellee's contention that no action was taken to foreclose Appellant's Chattel Mortgage (if material herein) ignores the fact that foreclosure was enjoined. [R. p. 92.]

Appellee's assertion that Appellant and LeRoy "informed both Referee and Trustee that they desired to bid at any sale, and to utilize the value of their lien claims upon such bids and in payment of the purchase price, if they were successful bidders," is taken out of context, and without reference to time or circumstances when made.

Such statement *was not made at the sale*, but was made approximately *a year and a half prior thereto*. At *that* time there was pending and undetermined the LeRoy and Rosehedge Motion⁵ and Trustee's Objection thereto, challenging the validity of their lien claims upon the real property. [R. pp. 97-106; pp. 57-66; pp. 3-20.] The Debtors had just been adjudicated bankrupts; no feasible plan of arrangement had been presented or was available; rapidly mounting unpaid obligations and expenses of the Receiver (Trustee) created serious problems, and the only solution appeared to be an immediate sale of the bankrupts' property—even before the completion of the hearing and determination of the LeRoy and Rosehedge Motion and Trustee's Objections thereto. [R. p. 97.] During this crisis Trustee filed a Petition for Authority to Sell, free and clear of liens, the property of the Bankrupt, and another Petition for Authority to Sell, said property in accordance with the Bankruptcy Act. [R. pp. 98-99.] Faced with the possibility of a sale before their Motion and Trustee's Objections were heard and determined, Ap-

⁵Motion of LeRoy Investment Co. and Rosehedge Corporation for Leave to Proceed with Sale under Pledge, etc.

pellant and LeRoy sought a Stipulation, and Order which would permit, *among other things*, that they *may* be bidders, or purchasers, at any sale, and that they *may* use on account of any bid or purchase price their respective lien indebtedness, in whole or in part. [R. pp. 60-64.]

This Stipulation, dated June 18, 1956, and the Order of July 6, 1956, merely *permitted* Appellant and LeRoy to utilize these claims, *if they so desired, but did not require them to do so*. Such Stipulation and Order were *then* necessary to protect their rights at any sale held before the validity of their liens was determined; otherwise their objections to Trustee's Petition to sell, free and clear, would have had to be sustained. As stated in 6 Remington on Bankruptcy (5th Ed.), page 103, "But, ordinarily, a sale free and clear will not be ordered, before determination of the validity and priority of liens, over objections of a lien holder who may desire to bid and use the *ascertained* value of his lien in payment."

When the validity of his lien is unchallenged, a lien holder may bid at a sale, free and clear, and may apply the value of his lien upon the purchase price, giving his receipt as payment. (6 Remington on Bankruptcy (5th Ed.), Par. 2958, pp. 113-114; *In re Harralson*, 179 Fed. 490; *Wolffgram v. Marsh*, 280 Fed. 865, 866.) It was this *permissive* right that Rosehedge and LeRoy sought—to be *exercised* by them *only* when and if they *desired* to do so.

Appellee's summary of the Stipulation is both inadequate and incomplete. It, and the July 6, 1956. Order are more fully summarized in Appellant's Opening Brief (pp. 13-14).

However, it is the *actual* events which *occurred* at the sale on September 6, 1957,—*not* what the Stipulation *provided*—that is *material here*. The facts are that S. Kohn was bidder and purchaser thereat; that neither her bid nor purchase utilized the value of the LeRoy and

Rosehedge lien claims; on the contrary the bid and purchase were made *expressly subject to such liens*; that both the oral and written bid so provided [R. pp. 111-112; pp. 29-33; Rep. Tr. pp. 10-11, 14]; that the Referee accepted that bid upon *those terms and conditions*. [R. p. 116; Rep. Tr. p. 44, line 23, to p. 45, line 5]; and, that the Referee's Order Confirming Sale so provided; [R. pp. 66-74]; that it was affirmed upon review by the District Court upon those terms and conditions, modified only as to taxes. [R. pp. 128-135.] Appellee's Brief incorrectly states that Appellant and LeRoy were the bidders and purchasers at said sale. S. Kohn was the bidder and purchaser, and even though she was acting on behalf of LeRoy and Rosehedge, the legal consequences flowing therefrom are *different*. (See authorities cited in Appellant's Op. Br. at pp. 57 to 65 incl.)

While the Referee announced at the sale that he was upholding the validity of the LeRoy and Rosehedge lien claims, nevertheless the *amount* of such lien claims was *not fixed or determined until after the bid of S. Kohn had been made, and accepted, and after the sale had been completed*.

It was *thereafter* that the Referee took evidence pertaining to the claims of LeRoy and Rosehedge, and *then* allowed LeRoy \$28,087.50, as interest, \$15,750.00 as attorney fees, and \$3,885.00 for the preservation or protection of the property, and allowed Appellant \$15,442.99, as interest, \$8,890.00 as attorney fees, and \$3,585.00 for the preservation or protection of the property—a total of approximately \$75,640.47. These sums were in *addition* to the principal sum of \$225,000.00 allowed to LeRoy, and \$125,928.66 allowed to Rosehedge on their liens. [Rep. Tr. pp. 47-50; R. pp. 37-42.]

S. Kohn could not utilize the value of Appellant's and LeRoy's lien claims in her bid or purchase, since the *amounts* of such liens claims *were not fixed or deter-*

mined by the Referee until after the bid of S. Kohn had been made, accepted, and the sale completed. It cannot be argued successfully, at least so far as the \$75,640.00 is concerned, that the bid and purchase of S. Kohn utilized this amount, for such sum was not in existence or determined when the bid was made or accepted.

Appellee's Brief (p. 4), quoting an incomplete statement made by Mr. Katz, sedulously avoids setting forth the *entire* statement, which conveys a meaning contrary to that asserted by Appellee. The entire statement is as follows, being italicized as to the portion *omitted* by Appellee:

"We do have an offer that we desire to submit, and our offer is, in effect, to pay the equivalent of roughly five hundred sixty or six hundred thousand dollars, and the reason I say roughly, is because the exact amount would follow the Court's determination of what fees would be allowed on these in connection with the foreclosure of the trust deed, and that would be made up as follows: *we would pay one hundred sixteen thousand cash now, for the assets, free and clear of all lien claims, and encumbrances, excepting only that we would take it subject to the taxes unpaid to the County of Clark, that would be the State, County and City taxes, for the period January 1955 through date, and we would take it subject to that six hundred thousand trust deed and subject to the pledge of that six hundred thousand dollar trust deed to LeRoy and Rosehedge in the amounts as shown in the order, your Honor, which I have just handed up to you. As part of that consideration, there would also be conveyed to us—by us, the bidder is a secretary in my office, one Sylvia Cohen—additionally and for the same consideration, which would acquire by bill of sale, all of the right, title, interest in and to the estate of the trustee, in the furniture, furnishings, gaming equip-*

ment and other tangible personal property, subject however to all valid and subsisting conditional sales contracts and chattel mortgages. That is, we do not think we have the right to get that free and clear. And then upon acceptance of the offer we would ask to be put into the peaceful possession of the assets.

“Now, that is in writing, your Honor. Would you like me to file that?” [Rep. Tr. p. 10, line 5, to p. 11, line 10.]

It is self-evident therefrom that the S. Kohn bid did *not* utilize, or attempt to utilize, the value of the LeRoy and Rosehedge lien claims, but on the contrary states that bid was made *subject to such lien claims*. Shortly thereafter, the Referee read aloud the terms of the *written bid* which expressly provides that the bid was made *subject* to the LeRoy and Rosehedge lien claims. [Rep. Tr. p. 14, lines 2, to 22; R. pp. 29-33.] This is not the same as utilizing such lien claims. In any event, the *written bid*, which was filed and accepted, *controls*.

The Referee, in accepting the S. Kohn bid, stated: “The Court will accept the offer of Sylvia Cohen as the best offer for the sale of the premises described in the notice heretofore given in these proceedings, *subject to the terms and conditions of that offer*, and the payment to this Court of a sum of one hundred sixteen thousand dollars.” (Italics ours.) [Rep. Tr. p. 44, line 23, to p. 45, line 3.]

Neither does the Referee’s statement found in Appellee’s Brief (p. 4) change the foregoing, nor does it sustain Appellee’s argument. The Referee merely attempted to explain to creditors, in simple language, the *effect* of the bid, and, incorrectly stated that Mr. Katz was bidding in the trust deeds held by Rosehedge and LeRoy, which was not the fact. All the Referee in reality said was that the offer (bid), subject to the liens of LeRoy and Rosehedge, insofar as the rights of creditors and the

bankrupt estates were concerned, was similar, *in effect and in essence*, to bidding in the trust deeds held by LeRoy and Rosehedge, for, in either case, the *effect* was to relieve the bankrupt estates and the Trustees from payment of the amount of such lien claims, and that *all* the Estates *were receiving* was \$116,000.00 in cash. As far as creditors and the Bankrupts' Estates were concerned, it was immaterial, whether the lien claims of LeRoy and Rosehedge were utilized, or the property was purchased subject to the liens. In either case the *net amount of cash received* from the sale was the same, *i.e.*, \$116,000.00. That was the *important* thing the Referee sought to impress upon the creditors. *He was not then concerned with, nor was any question before him concerning*, any rights, or disputes between Appellant and Appellee respecting their Chattel Mortgages; particularly so, as the personal property was being offered for sale *subject to all valid and subsisting Conditional Sales Contracts and Chattel Mortgages*. [Rep. Tr. p. 13.]

Besides, the *materiality* and *legal effect* of the Referee's statement is *naught*. It *cannot* impeach his Order Confirming Sale, which provides that the property was purchased by S. Kohn *subject to the Rosehedge and LeRoy lien claims*.

As stated in *Mercury Engineering Co.*, 60 Fed. Supp. 786, 788:

"The Referee speaks to the Court through his Order which grants or denies certain things, and not through the reasons for the Order."

This rule is stated by a District Court of Appeal of California, in *Estate of Swanson*, 171 A. C. A. 474, 480, as follows:

"The oral comments of the trial judge do not form a part of the final judgment and cannot be used to impeach the finding and judgment." (Italics ours).

Appellee mistakenly asserts that the Referee found that Appellant and LeRoy had bid in the amount of the encumbrances held by them, plus an additional \$116,000.00. Appellee's reference to the printed record states: "This bid was made subject to the liens and claims of LeRoy and Rosehedge" [R. p. 117]. The matters thereafter set forth constitute the Referee's *expression of opinion*, used by way of example; not a *statement of fact nor a finding of fact*. (For discussion see Appellant's Opening Brief, pp. 21, 22, 23, 34, 53, 55).

This also answers Appellee's fallacious contention that the isolated portion of the Referee's Certificate, (Appellee's Br. p. 5) prepared long *after* his Order Confirming Sale was signed and entered, constitutes a "finding". It is well settled that a Referee cannot make *additional findings of fact after* a Petition for Review has been filed. (*In re Peoria Barumcister Co.*, 138 Fed. 2d 520, 522; 8 Remington on Bankruptcy (6th Ed.) 310).

Appellee argues that Appellant at no time objected to the manner in which the Referee's regarded said bid, and filed no Petition for Review from the Referee's Order. There is no review from the Referee's "statement"; neither can the Referee's statement *impeach* his Order. The Referee's Order Confirming Sale *correctly* adjudicated that the property was sold to S. Kohn *subject to the Rosehedge and LeRoy lien claims*. Therefore, Appellant was not aggrieved thereby, and could not review such Order. It is the *Referee's Order*, and *not his statements*, which *determined the rights* of Appellant.

In bankruptcy sales the Referee's Order Confirming Sale is *controlling and fixes the terms of sale, and the rights and obligations of the parties*. (*In re Toledo Co.*, 152 F. 2d 210, 211; *American Dirigold Corp. v. Dirigold Metals Corp.*, 125 F. 2d 446, 454; *In re Rapier Sugar Feed Co.*, 13 Fed. Supp. 85, 89; 4 *Collier on Bankruptcy*

(14th Ed) 1588; *In re Strand Theatre*, 109 Fed. Supp 352).

Further, if, as Appellee contends, the S. Kohn bid and purchase utilized the value of the LeRoy and Rosehedge lien claims, the Referee's Order Confirming Sale *must have so provided. It did not.* Where a bidder uses the value of his lien in payment, the Order Confirming Sale *must so provide.* (4 Collier on Bankruptcy (14th Ed.) 1618).

Appellee concedes that the record does not show the value of the land and Hotel Moulin Rouge [Appellee's Br. p. 5]; yet she seeks to establish such value by the amount of liabilities of the Bankrupts. Value cannot be so determined. The record does show that the LeRoy and Rosehedge foreclosures sales were stayed for approximately two years, in the hope that an advantageous sale would result in something for general creditors; no sale or lease could be obtained, although the Trustee during said period advertised the property for sale extensively throughout the county, in widely circulated newspapers; solicited bids by brochures set far and wide, and actively sought sales or leases. [R. pp. 93-94; 68]. The sale was continued from time to time, because either no bids, or no adequate or substantial bids, were offered or received on the various dates set for the sale. [R. pp. 94; 106-110; Rep. Tr. pp. 16-17]. The Referee's Order recites "the aforesaid bid of S. Kohn was the highest and best bid made at said sale and the highest and best bid which could and can be obtained for said property." [R. p. 70]. The District Court's Order also contains a like statement, and further recites "that none of the Petitioners on Review have shown that any higher or better bid or offer or sale can be had for the property involved herein." [R. p. 132]. Appellee was a Petitioner on Review. [R. p. 75]. Under such circumstances the sale price obtained at the Referee's sale is the *best* and *only* evidence of the value of the prop-

erty in the record. Certainly, such value cannot be established by the liabilities of the bankrupts, *who were hopelessly insolvent*. [R. p. 94].

Appellee's statement that LeRoy and Rosehedge were the bidders; that they bid in their respective liens; and that the greatest part of the bid was used in satisfaction of their liens are misleading, and misconstrue the record. Such statements are *contrary* to the evidence, to the terms of the bid, to the Referee's Order, and to District Court's Order.

Appellee's statement, that Appellant and the Referee regarded the S. Kohn bid as utilizing the entire amount of Appellant's and LeRoy's claims, is misleading; certainly no such finding was or could be made.

Appellee's reference to her first Petition for Review cannot assist her herein. This was a review from the Referee's Order of September 6, 1957, upholding the validity of LeRoy's and Rosehedge's liens upon the *real* property. It did not relate to or involve Appellee's, or any other, chattel mortgage. No appeal has been taken from *this* Order and it now is final. [R. 33-48.]

Appellee's statement that the Referee confirmed the sale to Appellant and LeRoy is incorrect; rather the Referee confirmed the sale to S. Kohn, and the personal property was sold *subject to all valid and subsisting conditional sales contracts and chattel mortgages* [R. pp. 66-74]. His Order so provides. [R. pp. 66-74]. The Referee at *no time ruled* that Appellee's Chattel Mortgage was superior to that of Appellant; no such issue or question was before the Referee on September 6, 1957; no hearing, adversary or otherwise, was or could be had thereon, since Appellee was not even present or represented at the sale. Besides any issue relating to the validity or priority of their respective Chattel Mortgages at the sale would have been improper, (8 C. J. S. 1044).

Appellee's Petition for Review never asserted that her Chattel Mortgage was superior to that of Appellant. No such ground of review, or contention, is stated, or set forth in her Petition [R. pp. 75-81.] (See Point III Appellant's Op. Br. pp. 43-45; pp. 19-21.) The incorporation by reference of Appellee's First Petition for Review, into her Petition for Review from Referee's Order of September 23, 1957, did not aid Appellee. The various grounds for review set out in this Petition (summarized in Appellant's Op. Br. pp. 19, 20 and 21 thereof) were directed to the Referee's Order of September 6, 1957, *not* to the September 23, 1957 Order, and constituted a collateral attack upon the first Order; they were unavailing, as her Petition for Review from Referee's Order dated September 23, 1957 was filed *more than ten days after* filing of Referee's September 6, 1957 Order (*In re Wyoming Valley Collieries Co.*, 29 Fed. Supp. 106, 107, 108; 11 U. S. C. A., Sec. 67c; Bankruptcy Act, Sec. 39c). The *only* grounds in her Second Petition, which were directed to the September 23, 1957 Order, assert that the bid of and sale to S. Kohn violated the Order of July 6, 1956,—an untenable position rejected by the District Court on Review. There is not even a *mention* in her Petition that the Sterrett Chattel Mortgage was prior or superior to that of Appellant. In fact Appellee in her Petition for Review asserts (Spec. 7a) that the offer made by S. Kohn . . . "was not made free and clear of all liens and was made expressly subject to a trust deed in the amount of \$600,000.00 . . . and the assignments thereof to LeRoy . . . and Rosehedge . . . That by virtue of said exceptions, said sale to S. Kohn . . . was not free and clear of all liens." [R. pp. 76-77.] Appellee *now* asserts a position directly contrary thereto. The District Court made *no* implied (or other) *finding* that Appellant had bid in the amount of its lien claim at the sale, or that its claim had been extinguished, or that

Appellant had no further rights under its Chattel Mortgage. There is no recital, statement or findings, in either the Referee's Order, or in the District Court's Order upon Review, that the bid of or sale to S. Kohn used, utilized, or included the value of the LeRoy and Rosehedge claims, or that said sale satisfied and extinguished the Rosehedge lien claim and its Chattel Mortgage. There is no such evidence. There is no such finding. Appellee incorrectly states the record. Her "Statement of Case" should be rejected.

Statement of the Facts From Reporter's Transcript.

A brief résumé of the *material* matters in the Reporter's Transcript discloses that on September 6, 1957, the meeting was called to order and the various parties present noted their appearances in the record. Appellee was neither present nor represented thereat, or during the sale. [Rep. Tr. p. 2, line 16, to p. 3, line 20.] Upon inquiry, the Referee was advised that the proposal, considered at the previous meeting, had not materialized, but was told that if a continuance was had, another plan might be offered. The Referee then asked for offers to purchase the Moulin Rouge property. [Rep. Tr. pp. 3-8.] Mr. Katz then orally announced,⁶ and then submitted a written bid in the name of S. Kohn [Rep. Tr. p. 84, lines 10-11.]⁷

Trustee's attorney announced that the \$116,000.00 offered would only cover the accrued (\$72,000.00) expenses of preservation, and expenses of administration attributable to the sale, and would leave nothing for

⁶The full text of Mr. Katz's oral statement has been set forth under "Comments on Appellee's Statement of Case."

⁷The Order that is referred to and discussed by both Mr. Katz and Mr. Quittner during this hearing and sale was a proposed, but incomplete and unsigned Order, relating to the LeRoy and Rosehedge Motion and Trustee's Objections thereto. Subsequent to the sale, this Order was completed and signed by the Referee, and is found in the printed Transcript of Record pages 33-48.

junior lien holders and unsecured creditors, that the personal property was encumbered; that Trustee would sell "only his right, title and interest in and to the same, subject to the many conditional sales contracts and chattel mortgages"; that the purchaser would have to follow through on this matter. "*The Trustee would not, because he would have no further interest in it.*" [Rep. Tr. pp. 11-13.] (Italics Ours.)

The Referee then read aloud the written bid of S. Kohn [Rep. Tr. p. 14], this provided that S. Kohn offered to purchase all the real property, with its improvements for \$116,000.00 cash, free and clear of all liens, claims and encumbrances, excepting the following: (1) specified State, County and City taxes; (2) a specified assessment; (3) the \$600,000.00 Shulman trust deed; (4) the assignment thereof by Bisno & Bisno, Inc. to Alexander Bisno and Louis Rubin; (5) the assignment and pledge of aforesaid trust deed by Bisno and Rubin to LeRoy; (6) the assignment and pledge of aforesaid trust deed by Bisno and Rubin to Rosehedge; and additionally, and for the same consideration, all of Trustee's right, title and interest in and to the furniture, furnishings, gaming equipment of all kinds, and other tangible personal property pertaining to the business of Moulin Rouge, *subject to all valid and subsisting additional sales contracts and chattel mortgages against the said personal property*; that the sale was to be consummated through, and the purchase price was to be paid in an escrow; that Purchaser was to obtain a policy of title insurance guaranteeing title as set forth in said bid. [R. pp. 29-33.]

The Referee then stated that the bid meant that unsecured creditors and mechanic lien holders would receive nothing; that the \$116,000.00 would pay only expenses of administration, which were then about \$72,000.00, and including taxes were \$122,931.87; that all of this had accumulated since bankruptcy; that the Trustee had done everything possible to sell the property; he had

carried on an extensive advertising campaign in newspapers and by brochures; he had answered hundreds of inquiries and had shown the property to many people; that the Referee had continued the sale from time to time over an extended period, and no acceptable plan was presented, and no acceptable bid was made; that unless some better offer was presented, the Referee would have to accept the S. Kohn bid. Various creditors and attorneys spoke.

The Referee then announced a recess until 1:30 P.M. of said day to permit a requested conference. [Rep. Tr. pp. 15-21.] While the Court was still in session, the Referee asked of Mr. Katz who S. Kohn was, and Mr. Katz replied that she was a secretary in his office, and that she was making the bid as a matter of convenience. (D. C. Order May 28, 1959.)

When Court re-convened, the conference was reported unsuccessful. An oral bid, as a proposed plan, was then submitted. Various objections thereto were interposed. [Rep. Tr. pp. 21-24.] These disclosed that such bid did not constitute a firm bid, or plan, but was incomplete, conditional, contingent and dependent upon various contingencies and uncertainties; that the amount of available cash offered was insufficient to meet the immediate needs of the trustee; that it would require a lengthy continuance, and consent of all lien holders to subordinate their liens to the proposed new trust deed; all without any assurance or hope that a feasible and acceptable plan could or would be presented at a later date. [Rep. Tr. pp. 24-34.]

The Referee stated that without a concrete and definite plan being presented, he could not continue the matter; that during a two year period there had been many hearings and many continuances of the sale, all in the hopes that an adequate bid or concrete plan could be presented, to provide something for unsecured creditors; that the

Trustee had made strenuous efforts to sell the property, but no practical plan had been offered, and that he no longer could continue the sale unless something concrete was presented which would be acceptable to the Court, and to the holders of the trust deeds. The proposed offer or plan was rejected. [Rep. Tr. pp. 34-37.] The Referee then read his decision in another matter. [Rep. Tr. pp. 37-43], and also announced that he was holding that LeRoy and Rosehedge had a first lien upon the Moulin Rouge properties. The Referee then stated: "The Court will accept the offer of Sylvia Cohen as the best offer for the sale of the premises described in the notice heretofore given in these proceedings, *subject to the terms and conditions of that offer*, and the payment to this Court of a sum of one hundred sixteen thousand dollars." [Rep. Tr. p. 44, line 23, to p. 45, line 3.] (*Italics ours.*)

The bidder, through Mr. Katz, also orally agreed to pay escrow and title charges. [Rep. Tr. p. 45.] A recess was then taken, *following* which evidence was received regarding attorney's fees, interest and expenses incurred and expended for the preservation and protection of the property by LeRoy and Rosehedge. [Rep. Tr. pp. 47-49.] The Referee *then* announced that *his Orders would be* [Rep. Tr. p. 49] that Rosehedge was allowed \$15,442.99 as interest, \$8,890.00 as attorney fees, and \$3,585.00 as costs of preservation, and these items *were to be added* to the principal sum of \$125,928.00; that he found that the principal due to LeRoy was \$225,000.00, and allowed \$28,870.50 as interest (at 6% rather than 11½%); \$15,750.00 as attorney fees; and \$3,885.00 as cost of preservation to LeRoy. The Referee then completed and signed the proposed Order.⁸

The meeting then adjourned and the escrow was opened. [Rep. Tr. pp. 49-51.]

⁸This is the Order Granting Motion of LeRoy and Rosehedge for Leave to Proceed, etc. [R. pp. 33-48.]

Supplemental Specification of Error.

The original Specifications of Errors set forth in Appellant's Opening Brief pages 26-35 are still applicable. Only Specification 9 need be enlarged to include additional *material* matters from the Reporter's Transcript, and which are not otherwise found in the record. This Specification provides:

"9: The portion of the District Court's Order ordering Rosehedge to release its chattel mortgage through escrow to Millie Sterett, a subsequent chattel mortgage claimant, is prejudicially erroneous in that it is not supported by the evidence".

We add the following to the original Specification 9. (Appellant's Op. Br. pp. 31-35):

Mr. Katz, in announcing S. Kohn's bid, stated such bid *in effect* was to pay the *equivalent* of roughly \$560,000.00 or \$600,000.00 (these sums were mentioned merely as the guide to any other prospective bidders present who may have desired to make a bid for the property free and clear of liens), and he then proceeded to outline the terms of such bid, *i.e.*, payment of \$116,000.00 cash for the assets which would be taken *subject to* certain taxes, *subject to* the Shulman \$600,000.00 trust deed, and *subject to the LeRoy and Rosehedge pledges thereof* to the amounts of their then undetermined lien claims and the personal property *subject to* all valid and subsisting conditional sales contracts and chattel mortgages. Mr. Katz *did not state* that such amount (\$560,000.00 to \$600,000.00) was then being bid, by his bidder, or that the bidder was utilizing the amount of the lien claim of LeRoy and Rosehedge in the bid. This could not be done, for *at that time* the full amount of such lien claims were undetermined, unliquidated and not ascertained, and there could be no valid or acceptable bid in an indefinite, undetermined and unliquidated amount.

A bid at a public sale must be in a definite sum. Besides the latter and more *specific* part of his statement, detailing the various items making up the bid, control over the more general first portion of his statement. Further, said announcement made reference to a *written* bid, which was *filed*, [Rep. Tr. p. 11], *read* aloud, [Rep. Tr. p. 4] and *accepted* by the Referee [Rep. Tr. p. 44], and provided that the bid was made *subject to the lien claims of LeRoy and Rosehedge*. This written bid superseded any oral statement of its contents. It was this written bid which was filed and accepted. [Tr. pp. 43-44.]

The Referee's statement was that *in essence* Mr. Katz was bidding in the trust deeds, *not that in fact* Mr. Katz was bidding in such trust deeds. The Referee was then attempting to state in simple language the *essence* and *effect* of such bid,—*not its exact terms*,—for it was immaterial to either creditors, or to the Referee, whether the bid utilized the lien claims of LeRoy and Rosehedge, or that the bid offered to purchase the property *subject* to such lien claims. As far as rights of creditors and the bankrupt estates were concerned, the net result was the *same*; in either case the lien claims would not be payable from the proceeds of sale, or by the bankrupt estates; in either event the amount of cash received by the Trustee would be identical, and would constitute the *only money available* for payment of Trustees' obligations, and creditors' claims. *That was the important thing the Referee sought to convey to the creditors.*

In any event, both Referee's and Mr. Katz's statements became *merged* in the Referee's Order, and cannot now be used to impeach his Order Confirming Sale (and affirmed on review, except modified as to taxes) to show that the property was sold to S. Kohn *other than subject to the LeRoy and Rosehedge lien claims.*

Also the Referee accepted the bid "*subject to the terms and conditions of that offer*"—being the written offer previously read and filed. [Rep. Tr. pp. 43-44.]

Additionally, the total amount of the LeRoy and Rosehedge lien claims had not been ascertained, determined, fixed, or awarded at the time the bid was made and accepted; *thereafter, more than \$75,000.00 was added to the amount of these claims as they existed at the time the bid was made and accepted*, and the *principal* amount of the LeRoy claim was *then* fixed. The Referee's Order which allowed the total amounts of the LeRoy and Rosehedge claims *was completed and signed after the said bid was made and accepted*. Obviously, it would have been *impossible* for S. Kohn to have used or utilized the full amount of the LeRoy and Rosehedge claims in her bid. They were then *undetermined and unliquidated*, both as to *allowable items and in amounts*.

ARGUMENT—POINTS AND AUTHORITIES.

I.

Appellee Has Not Presented Any Evidence or Law to Sustain Her Contention That Appellant's Lien Claim Was Satisfied and Extinguished by the Bid and Sale. Such Contention Constitutes a Collateral Attack Upon the Terms of the Sale, the Referee's Order, and That Portion of the District Court's Order From Which Appellee Has Not Appealed.

Appellee's Brief and contention disregards several important factors herein. This appeal involves *only* that portion of paragraph III of the District Court's Order by which Appellant is aggrieved. [R. pp. 139-140.] *Appellee has not appealed from the District Court's Order, or any part thereof. Those other portions of said Order, from which no appeal has been taken, are now final. A Court of Appeals will not review any part of an Order not brought up upon appeal and from which no appeal has been taken.* (8 C. J. S. 1636; *Ewart v. Eloy Gin Corp.* (9th Cir.), 204 F. 2d 712, 716; *City of Long Beach v.*

Metcalf (9th Cir.), 103 F. 2d 493; *Wheeler v. Smith* (9th Cir.), 30 F. 2d 59, 61; *Arkansas Fuel Oil Co. v. Leisk*, 133 F. 2d 79, 81; 2 *Collier on Bankruptcy* (14th Ed.) 970.) In *Evart v. Eloy Gin Corp.*, *supra*, this Court states (p. 716):

“That part of the claim was decided on the merits adversely to Appellant, and no appeal having been taken it is not before us.”

In *Arkansas Fuel Oil Co. v. Leisk*, *supra*, page 81, we find:

“In the absence of a cross-appeal, Appellee may not attempt either to enlarge his rights under the judgment appealed from, or *lessen* the rights of his adversary.” (Italics ours.)

The statement of facts and recitals in Referee's Order Confirming Sale⁹ [R. pp. 67-70], and reaffirmed in the District Court's Order¹⁰ stating “that the statement of facts and recitals of the proceedings had, as set forth in the aforementioned Referee's Order . . . are correct, and by reference made a part hereof,” and the other recitals therein contained [R. pp. 128-133] *cannot now be challenged by Appellee. Such recitals import absolute verity.* (*In re Trumbal*, 55 F. 2d 165; *Mayfield v. Aetna Life Ins. Co.*, 100 F. 2d 199; *Wall v. United States*, 97 F. 2d 672; *Day-Gormley Leather Co. v. Nat'l City Bank*, 89 F. 2d 703; *Snider v. Sand Springs Ry. Co.*, 62 F. 2d 635; 36 C. J. S. 318.) Likewise, the terms of the sale, *confirmed* by Referee's Order, and *affirmed* by the District Court (modified only as to taxes), and the portions of the District Court's Order from which no appeal has been taken, are now conclusive.

⁹Summarized in Appellant's Opening Brief, p. 31.

¹⁰Summarized in Appellant's Opening Brief, pp. 31-32.

The Referee's Order [R. pp. 66-75] confirmed the sale of the real property to *S. Kohn*, as purchaser, *subject to* the lien and lien claims of LeRoy and Rosehedge [R. p. 72], and the sale of the personal property to *S. Kohn*, *subject to all valid and subsisting chattel mortgage*. [R. p. 73.] The *unappealed* portion of the District Court's Order expressly affirmed the Referee's Order *in all respects* (modifying it only as to taxes, not involved herein) [R. pp. 134-135], and expressly *adjudged* that the real property was sold *to S. Kohn subject to the LeRoy and Rosehedge liens and lien claims*. [R. pp. 134-135.] The District Court's Order [Par. III] also adjudged "That the Petition for Review . . . filed on behalf of Millie Sterett, be, and the same is hereby dismissed, and the relief sought by said Petitioner . . . is denied, and said Petitioner's objections to the aforesaid Referee's Order . . . are, and each of them is overruled." [R. pp. 135-136.] Appellee cannot now contend otherwise, for such adjudications are now final, and any challenge thereon constitutes a collateral attack upon the unappealed portions of said Order, and upon Referee's Order Confirming Sale.¹¹

It is well settled that the validity of the sale, or the terms of the Order Confirming Sale, are not open to inquiry, or impeachment, collaterally, in any proceeding, either in State or Federal Courts. (*Stanley v. Graham Products*, 83 F. 2d 489, 491; *Larkin Green Logging Co. v. Sabin* (9th Cir.), 222 Fed. 814, 816; *In re Ostlind Mfg. Co.*, 19 Fed. Supp. 836; *Miller v. McKenzie*, 217 Cal. 389, 19 P. 2d 1; 4 *Collier on Bankruptcy* (14th Ed.) 1587-1588; 8 *C. J. S.* 1078; 6 *Remington on Bankruptcy* (5th Ed.) 104, 105.)

Throughout her Brief Appellee incorrectly *assumes* that Appellant was the purchaser. *S. Kohn* was *adjudged* the

¹¹Summarized in Appellant's Opening Brief, pp. 2-3, 18-19.

purchaser both by the Referee's Order and by the District Court's Order. This adjudication is final. However, even if Appellant had been the purchaser (*it was not*), Appellee's contention of merger would not apply; the authorities cited by her hold otherwise. The personal property was acquired by S. Kohn *subject to all chattel mortgages*. Appellee's chattel mortgage was *junior and inferior* to Appellant's chattel mortgage.

It is the universal rule that acquisition of the equity of redemption, or title, by the mortgagee, *in his own name*, will not result in a merger, where the continued existence of the mortgage is necessary to protect his lien against intervening liens of junior lien holders. It will be presumed that the mortgagee intended to do what would accord with his best interest, and equity will keep the legal title and the mortgagee's interest separate in order to preserve his superior lien against junior lien holders. The presumption is that *no merger was intended*. (*The Bergen*, 64 F. 2d 877, 880-881; 59 C. J. S. 682-683; 33 Cal. Jur. 2d 672, and other authorities cited in *Appellant's Op. Br.* pp. 58-65.)

In *Toston v. Utah Mortgage* (9th Cir.), 115 F. 2d 560 (cited by Appellee), it was held that acquisition of the land by mortgagee upon which other liens, did not create a merger. This Court stated:

"So merger will not be declared in such a case as this if contrary to the intention of the *mortgagee*, or *against his best interests*." (Italics ours.)

Likewise in Appellee's cited case, *Guaranty Trust Co. v. Minneapolis, etc. Co.*, 36 F. 2d 747, the Court states:

"It is only when the fee and the lien center in the *same person*, *without any intervening claims, liens, or equities*, that a merger of title and the lien will take place."

It is true that merger is a question of *intent*, but it is the *mortgagee's intent which controls—he alone has the election*. (59 C. J. S. 677; *Guaranty Trust Co. v. Minneapolis etc. Ry. Co.*, *supra*; *The Bergen*, *supra*.)

Particularly, there is no merger when conveyance is made to, or title is taken in the name of, a *third person—even the agent of or Trustee of the mortgagee*. (See authorities cited in Appellant's Br. pp. 60-63.) *Humrich v. Dalzell*, 166 Atl. 511, 512, 113 N. J. Eq. 310, is factually similar and directly in point.

Appellee's summary of the "evidence" fails to sustain her contentions.

Her partial and incomplete quotation of Mr. Katz's announcement of the S. Kohn bid—properly analyzed and read in the light of the entire statement—conveys a meaning *contrary* to that urged by Appellee. In the omitted and latter portion of the statement, Mr. Katz outlined the exact terms of the bid—the payment of \$116,000.00 cash for the assets, *subject to the LeRoy and Rosehedge pledges and lien claims* (among other things) and for the personal property "*subject to all valid and subsisting . . . chattel mortgage.*" [Rep. Tr. pp. 10-11.]

This *entire* statement cannot as a matter of law sustain Appellee's construction. The generalized first part of the statement (quoted by Appellee) is controlled and *limited* by the more specific latter portion thereof. 17 C. J. S., Contracts, p. 732, states: ". . . and in a like manner general expressions will be restricted to particular descriptions or additions following them." *Standard Steel Car Co. v. United States*, 67 Ct. Cl. 445, 480, states this rule: "General provisions . . . when in conflict with particular specifications thereof following later . . . *must yield to latter.*" (Italics ours.) Mr. Katz *specifically* stated that the offer was to purchase the assets for \$116,000.00 cash, *subject to the LeRoy and Rosehedge lien claims*. A party purchasing property subject to liens

is bound *only* to the extent of the property. (*Brichetto v. Raney*, 76 Cal. App. 232, 247, 245 Pac. 235.) The term “*subject to*”, in legal parlance, connotes an *absence* of personal liability. (*Helvering v. S. W. Consolidated Corp.*, 315 U. S. 194, 200, 86 L. Ed. 789, 795.) It also means “charged with”. (*Sanitary Appliance Co. v. French*, 58 S. W. 2d 159, 163.) Thus, the offer was to pay \$116,000.00 for the assets charged with the liens and lien claims of LeRoy and Rosehedge, without personal liability therefor on the part of S. Kohn—the bidder. Even the first portion of Mr. Katz’ statement cannot sustain Appellee’s interpretation. The term “in effect” means “a consequence produced”; “a result that follows” (29 *C. J. S.* 835), and “equivalent” means “equal in value—equal in force or authority.” (Vol. 1, Webster’s New International Dictionary Unabridged, 2d Ed., p. 65.) Properly construed, Mr. Katz’ announcement was that the offer would produce a result equal in value roughly to \$560,000.00 or \$600,000.00, and this offer consisted of payment of \$116,000.00 cash for the assets, *subject to* and *charged with* certain taxes (approx. \$52,000.00) the Schulman trust deed, and the lien and lien claims of LeRoy and Rosehedge—subsequently and following the sale, adjudged to be \$427,568.15. Such a bid would be equal in value, roughly, \$560,000.00 to \$600,000.00. By acquiring the property *subject to* taxes and the LeRoy and Rosehedge lien obligations, the estate and creditors would benefit to the extent of those amounts—equivalent to \$479,569.16—because the assets acquired were subject to and charged with such lien debts, and the Trustee and bankrupt estates *would be relieved* from the payment of these obligations. This type of bid produced a result equal in value roughly between \$560,000.00 and \$600,000.00, *but* in so doing, the *bid did not utilize the value of the LeRoy and Rosehedge lien claims*. The land was still *charged therewith*. If the bid had utilized the value of such lien claims the amount

thereof would have had to be in an amount equal to the *sum total* of the cash, and total sums of the LeRoy and Rosehedge claims. The bid was not for such total sum. It did not, and could not include, or utilize, the value of said lien claims, for the amounts thereof were *then undetermined and unascertained*.

Neither does the Referee's statement, that *in essence* Mr. Katz was bidding in the trust deeds of LeRoy and Rosehedge, aid Appellee, or bind Appellant. All that Referee was stating, in effect, was that the estates and trustee did not have to pay the LeRoy and Rosehedge lien claims, and that the Trustee was receiving only \$116,000.00, in cash. It was immaterial to the Referee, Trustee and creditors whether the bid was *subject to* the LeRoy and Rosehedge lien claims, or utilized them, for in either event, \$116,000.00 was the only cash the Trustee was receiving, and *that* was the only *thing of importance* to the creditors. There was then no proceeding before the Referee determining the rights, claims, or priorities, *between Appellant and Appellee*, of their chattel mortgages. Besides, the Referee further announced that he accepted the bid of S. Kohn as the best offer "*subject to the terms and conditions of that offer*" i.e., the *written* bid on file and previously read aloud.

Finally, the Referee's statement (upon which Appellee relies) was *merged* into the Referee's Order. This provided that the premises were purchased by *S. Kohn, subject to the lien and lien claims* of LeRoy and Rosehedge (among other things). It cannot now be used to impeach his Order. As stated in *Mercury Engineering Co.*, 60 Fed. Supp. 786, 788, "The Referee speaks to the Court through his Order which grants or denies certain things, and not through their reasons for the Order." A California District Court of Appeal in *Estate of Swanson*, 171 A. C. A. 474, 480 stated, "The oral comments of the trial judge do not form a part of the final judgment and cannot be

used to impeach the findings and judgment.” The Supreme Court of the State of California succinctly states the rule in *DeCou v. Howell*, 190 Cal. 741, 750, 214 Pac. 444, as follows:

“The deliberations of the court are conclusively merged in the judgment. The findings of fact and conclusions of law constitute the decision which is the final, deliberate expression of the court. *To hold that oral or written opinions or expressions of judges of trial courts may be resorted to to overturn judgments would be to open the door to mischeivous and vexatious practices. Neither a juror nor a judge is permitted to impeach his verdict or judgment.*” (Italics ours.)

Mr. Katz’ oral statement also became merged into the “written bid,” and into the Referee’s Order confirming the sale upon the terms of the *written bid*.

Neither Appellee’s claim that Appellant and LeRoy had informed the Referee that they desired to utilize the value of their claims in any bid, or in payment of the purchase price, if they were the successful bidders, nor the ensuing stipulation, or Court Order of July 6, 1956, support Appellee’s position. Such statement was *not made at the sale, but approximately a year and a half prior thereto*, and at a time, and under entirely different circumstances previously detailed herein, under “Comments on Appellee’s Statement of Case.” This statement requested, and the ensuing Stipulation and Court Order provided merely a “permissive right.” It was *not mandatory* that this right be enforced. It *never was exercised*. *S. Kohn, not LeRoy and Rosehedge, was the bidder and purchaser at the sale. The Referee’s Order, and the District Court’s Order so provide and so adjudicate. This is now conclusive.*

Appellee *incorrectly* asserts that Appellant and LeRoy acquired the principal assets of bankrupts “free and clear of all liens.” Referee’s Order Confirming Sale [R. pp. 71-73], and District Court’s Order affirming same, *adjudged* [R. p. 135] that the real property was purchased by S. Kohn, *subject* to the lien of certain taxes, the Shulman Trust Deed, and the LeRoy and Rosehedge liens and lien claims; that the personal property was purchased “subject to all valid and subsisting . . . chattel-mortgages” thereon. Appellee’s only lien was an inferior chattel mortgage upon the *personal property*. Her present contention is contradicted in her Petition for Review [R. pp. 75-81] wherein [spec. 7a; R. pp. 76, 77], as a ground for reversal, she alleges the offer made by S. Kohn “*was not made free and clear of all liens, and was made expressly subject to a trust deed in the amount of \$600,000.00 . . . and the assignments hereof to LeRoy and Rosehedge. . . . That . . . said sale of S. Kohn was not free and clear of all liens.*” This, she asserted violated Referee’s July 6, 1956 Order. Appellee’s inconsistencies but exemplify her fallacious contentions herein.

Appellee’s Brief (p. 5) concedes that the record does not reflect the value of the Moulin Rouge property, but seeks to establish such value by the *liabilities* of the bankrupts, who were “hopelessly insolvent.” [R. p. 94.] Value cannot be so determined. Not only is her argument based thereon fallacious, but it *dehors* the record, and cannot be considered (*In re Paley*, 26 Fed. Supp. 952), and her authorities thereon are both distinguishable, and inapplicable.

Appellee erroneously argues that the Referee found that Appellant and LeRoy had utilized the entire amount of their claims by the bid of S. Kohn, and relies upon an isolated portion of the Referee’s Certificate on Review [R. p. 117] wherein Referee stated that *the bid was made*

subject to the liens and claims of LeRoy and Rosehedge, and *by way of an example*, illustrated that no prejudice resulted to creditors, the Trustee, or the bankrupt estates, *by such bid*, as the amount received therefrom, in the Referee's *opinion*, was the *equivalent* "equal in value" to a bid utilizing the value of the LeRoy and Rosehedge lien claims, since the net amount of money received in *either* case was the *same*, and in *either* case the Trustee, and the estates were *not* required to pay the lien claims of LeRoy or Rosehedge. This was a statement of opinion, not a finding of fact. *It was made long after the Review was taken.* A Referee cannot make *additional findings* of fact *after* the Petition for Review is filed. (*In re Peoria Braumeister Co.*, 138 F. 2d 520, 522; 8 *Remington on Bkcy.* (6th Ed.) 310.)

Appellee tenuously argues that under Sec. 39a(8) Bankruptcy Act (U. S. C. A. Sec. 67a(8) (which provides that Referee shall, among other things, transmit to the Clerks "the findings and orders thereon") the Referee's aforesaid "statement" from his Certificate constitutes a "finding of fact." This is not correct. The findings referred to in the aforesaid section are those findings made upon *disputed facts before* the Order is signed—those findings upon which the Order is *based*. Such provision of the Act does not mean that the Referee shall make his findings in his Certificate on Review. This would be too late and cannot be done. (*In re Peoria Braumeister Co.*, *supra*; 8 *Remington on Bkcy.*, (6th Ed.) 310.) The findings therein mentioned are those required by Rule 52a Federal Rules of Civil Procedure (28 U. S. C. A.) providing that "in all actions tried upon the facts without a jury . . . the Court shall find the facts specially and state separately its conclusions of law thereon and *direct the entry of the appropriate judgment.*" Rule 52a, however, applies only in *contested* matters upon *disputed questions of fact*. (*Fontes v. Porter* (9 Cir.), 156 F. 2d 956;

Matton Oil Transfer Co. v. The Dynamic, 123 F. 2d 799; 2 *Collier on Bankruptcy*, (14th Ed.) 1494) Rule 52a is applicable in bankruptcy proceedings (General Order 37) (U. S. C. A. fol. Par. 53; *Perry v. Bauman*, (9 Cir.) 122 F. 2d 407; *Rosenberg v. Heffron* (9 Cir.) 131 F. 2d 80; *In re Cesari*, 217 F. 2d 424, 427.)

No findings were required upon any matters now urged by Appellee. Appellee was neither present nor represented at said sale. There were no adversary proceedings, or any contested matters, between Appellee and Appellant, before the Referee; nor were there any questions of *disputed facts* before him upon any of the matters *now urged* by Appellee. General Order 47 (U. S. C. A. fol. Sec. 53) therefore is not applicable. The presumption of correctness of the Referee's findings does not extend to his conclusions. (*In re Harnick*, 151 Fed. Supp. 504.) The Referee's "statement" in his Certificate, is but his *conclusion* that said bid was the equivalent of utilizing the value of the LeRoy and Rosehedge lien claims. This "statement" in Referee's Certificate, is not, and cannot be upheld as a *finding of fact*.

Appellee's attempted distinction of the *Braumeister* case is without merit. This case clearly holds *that a referee cannot make findings after a Petition for Review is filed*.

Appellee's contentions regarding merger are fully answered, both herein and in Appellant's Opening Brief (Point VI pp. 58-65), together with the applicable authorities. Appellee has cited no contrary authorities. Her argument ignores the fact that the chattel mortgage held by her is junior and inferior to the chattel mortgage held by Appellant: that in such instances, the law is clear that merger is never presumed, even when the equity of redemption, or legal title is acquired by the *mortgagee*.

Appellee concedes that the S. Kohn bid for the property, *subject to the liens of Appellant and LeRoy* is an "indicia of intent" not to create a merger, but contends

that merger is a question of intent, and intent is a *question of fact*. In addition to such bid, both the Referee's Order, and the District Court's Order *adjudicated* that the property was acquired by S. Kohn, *subject to the LeRoy and Roschedge liens and lien claims*, and subject to all valid chattel mortgages. As a matter of law, there can be no merger; therefore, in view of the written bid, the Referee's Order and the District Court's Order what evidence has Appellee produced to sustain her contentions? The simple answer is *none*. On the question of merger, it is the *mortgagee's intent* that governs—he alone has the election to prevent a merger and keep the mortgage alive. (59 C. J. S. 677; *The Bergen* (9 Cir.), 64 F. 2d 877, 880, 881; *Guaranty Trust Co. v. Minneapolis Ry. Co.*, 36 F. 2d 747, 764; *Toston v. Utah Mortgage Loan Corp.*, 115 F. 2d 560, 562.) By asserting that intent is a question of *fact*, Appellee *concedes* that the District Court erred in holding *as a matter of law*, that the bid of and sale to S. Kohn extinguished Appellant's chattel mortgage by merger. Appellee seeks to escape the rule that a conveyance or transfer of the equity of redemption to an agent or trustee does not create a merger, by asserting that there is no showing that S. Kohn was either the agent or trustee for Appellant—only that the bid was made by her for convenience.

The Sale was *confirmed* to S. Kohn by the Referee, and this was affirmed on Review. If S. Kohn was neither an agent of or trustee for Appellant and LeRoy, she then was a stranger and, *as a matter of law*, there could be no merger, for the right or estate previously held, and the right or estate subsequently acquired, *did not coalesce* in the *same* person in the *same* right and in the *same* capacity. (See authorities cited in Appellant's Op. Br. p. 59.)

There is no finding by either the Referee or District Court of intent to merge; neither was the real property

acquired free and clear of liens; it was acquired *subject to the liens and lien claims of Appellant and Rosehedge*. Appellee's *only* lien was that of an inferior chattel mortgage lien holder. Nevertheless the "doctrine of intervening liens" applies to chattel mortgages, and a transfer of mortgaged personal property to *mortgagee, subject to chattel mortgages, evidences an intent that no merger shall be effected*. (*Beecher v. Thompson*, 120 Wash. 520; 207 Pac. 1056, 1057; 14 C. J. S. 994.) In *Burton v. Klein*, 239 N. Y. S. 103 the Court held that where a chattel mortgage was given as collateral security with a real estate mortgage, the mortgagee's purchase *at a bankruptcy sale*, and the acceptance of trustee's deed, and a quit claim deed to the premises, from mortgagors, *did not extinguish mortgagor's obligation under the chattel mortgage, through merger*. *This case is decisive against Appellee's contention*. Most certainly there is no merger when the real property is purchased *by a third person, subject to the lien and lien claims*, and the personal property is acquired, *subject to all valid chattel mortgages*. In such a case there can be no merger.

II.

Appellee Has Failed to Establish That the District Court, as a Bankruptcy Court, Either Had Jurisdiction to Order, or Correctly Ordered, Appellant to Release Its Chattel Mortgage Through Escrow.

The various points set out in Appellant's Opening Brief have been intermingled without sufficient segregation or headings, in Appellee's Brief. This tends towards confusion. Nevertheless, Appellee's reply thereto is erroneous, and her authorities are not applicable herein.

Appellant neither denies nor disputes that a District Court can modify a Referee's Order upon Review, provided said Court, as a bankruptcy court, has jurisdiction to determine the matter involved in such modification, or

otherwise modify such Order in accordance with the established law. Such is not the case in the instant appeal. There is no question but that courts of bankruptcy are invested with certain equitable jurisdiction to enable them to exercise original jurisdiction in bankruptcy proceedings. This jurisdiction, however, is not plenary equity jurisdiction, but only such equity jurisdiction as will empower the bankruptcy court to employ rules and principles of equity jurisprudence in the exercise of bankruptcy jurisdiction. (*Evarts v. Eloy Gin Corp.* (9 Cir.) 204 F. 2d 712, 715; *Kaplan v. Guttman* (9 Cir.) 217 F. 2d 481, 485; *Billings Credit Men's Assn. v. Bogert*, (9 Cir.) 5 F. 2d 307, 309; *Smith v. Chase Nat'l Bank*, 84 F. 2d 608, 615) A bankruptcy court has no jurisdiction to determine controversies between adverse third persons in which neither the Trustee nor the bankrupt estate has any interest, and which are not properly a part of bankruptcy proceedings. This includes controversy between adverse third persons relating to their respective rights, liens and priority of liens, which in no way affect the collection of assets, the administration of the estate, or the distribution of assets, and in which the Trustee is not involved. (See authorities, Appellant's Op. Br., pp. 46-51.) In the instant case, the personal property was sold subject to all valid chattel mortgages. The bankruptcy court thus declined to exercise its exclusive power to deal with liens and relegated the holders to enforcement remedies which they would have had available to them had bankruptcy not occurred. (*Gotkin v. Korn*, 182 F. 2d 380 and authorities in Appellant's Op. Br. pp. 46-47.)

Trustee's attorney announced at the sale that the personal property was encumbered, and that Trustee was selling only "his right, title and interest" therein, *subject* to the many conditional sale contracts and chattel mortgages; that if the purchaser was dissatisfied, he would

have to follow through, for "*the Trustee would not, because he would have no further interest in it.*" [Rep. Tr. p. 13.] The District Court on Review, was without jurisdiction to order Appellant to release its chattel mortgage in favor of Appellee since this was a collateral controversy between *third* persons in which the Trustee *had no interest*, and over property which had been sold "subject to all chattel mortgages". (Appellant's Op. Br. pp. 36-39; 46-51.) Appellee has cited no applicable authorities to sustain the District Court's jurisdiction. *In re Burton Coal Co.* 126 F. 2d 447, cited by Appellee involved re-organization proceedings wherein approval of the creditors was necessary. To obtain such approval, it was necessary to determine ownership of certain stock, without which the amount of the claims against debtors, could not be ascertained, and the bankruptcy Court could not proceed with re-organization. The Court stated: "Because of such fact, the jurisdiction of a Court of bankruptcy is *extended beyond what it ordinarily would be.* It extends to *such* disputes . . . *without the settlement of which*, re-organization *cannot* proceed." (Italics ours.)

In the instant case the determination of the Sterett controversy was neither necessary nor proper to complete the sale to S. Kohn, subject to chattel mortgages. Such sale preserved whatever rights Appellee had. Appellee asserts that *Bank of America v. Erickson*, 117 F. 2d 796 is directly in point. It clearly is not applicable herein, either factually, or legally. In said case, trustee objected to certain general claims asserting that they were not entitled to parity with other general claims, as they had been subordinated in agreement with the Creditors committee, in an assignment for the benefit of creditors. This Court correctly held that creditors, by agreement, could subordinate their claims to claims of other creditors, and that such an agreement would be upheld in bankruptcy. No such, or similar facts, or questions, are involved herein.

Other authorities cited by Appellee, related either to cases in which the *Trustee*, in *adversary proceedings with the creditor* challenged the liens, or claims; in others, the Trustee opposed the filing of a new claim, under the guise of an amended claim, after the six-month period had expired. No such or similar facts or adversary proceedings are involved herein.

Appellee does not cite a single authority which holds that she was “aggrieved” by the sale of the personal property “subject to all valid chattel mortgages”. She seeks to distinguish without success, a few of the many authorities cited by Appellant which unequivocally hold that a chattel mortgagee is *not* aggrieved by a sale of personal property, subject to chattel mortgages. Clearly Appellee did not have a right of review.

Appellee also urges that she was not estopped from reviewing the Referee’s Order of Sale. Estoppel, she states, is a question of fact. The Referee, in his Certificate, stated that she was estopped from review. [R. p. 120.] Under the unchallenged authorities Appellee was estopped; she was neither present or represented at the sale; she interposed no objection to either the S. Kohn bid, or to the acceptance thereof, or to the Order Confirming Sale prior to the signing by Referee thereof. Under these circumstances, the authorities unanimously hold that Appellee was estopped to review the Order. This doctrine of estoppel is based upon logic, and the necessities of progress in the administration of justice. (See authorities Appellant’s Op. Br. pp. 40-43.) Appellee has not cited a single authority to the contrary.

There is no merit in Appellee's contention that the Referee found that she was not estopped. He stated the contrary. [R. p. 120.] Her reference to Petition for Review from the September 6, 1957 Order is unavailing. This involved a review from a *different* Order, relating only to Appellant's and LeRoy's *liens upon the real property*; it in no way related to Appellee's chattel mortgage.

Appellee finally asserts even if her Petition for Review was insufficient, the District Court could consider said Petition. In certain instances where the specification of errors in the Petition are not specific enough, and error unquestionably appears in the record, the District Court may review the Order involved. "This does not mean, however, that questions foreign to the record, and presented neither by testimony, nor the pleadings, will be considered." (2 *Collier on Bankruptcy* (14th Ed.) 1497.)

In *In re Paley*, 26 Fed. Supp. 952, the Court states: "In reviewing the Order . . . the Court is *limited* to the *record before the Referee*. *No notice may be taken of the additional allegations of fact made in this Court on oral argument or in briefs.* (Italics ours.)

And *In re Sam Z. Lorch & Co.*, 199 Fed. 944, the Court rejected a Petition for Review, stating: "Besides, the validity of the mortgage was *not assailed* in the Trustee's pleadings on either of *those grounds*, and we do not doubt in this instance that the question before us on the Petition for Review *should be limited* to those *involved in the issues made before the Referee.*" (Italics ours.)

These authorities are particularly applicable herein.

We submit that Appellee has completely failed to answer or refute, either by logic, or by applicable authorities, the points raised, the arguments made, and the authorities cited in Appellant's Opening Brief.

Conclusion.

We respectfully submit that for the reasons, and upon the grounds herein, and in Appellant's Opening Brief, set forth, that the portion of the District Court's Order, from which Appellant has appealed, be reversed; that such portion be stricken from the District Court's Order, and that Appellant recover its costs of appeal herein.

Respectfully submitted,

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No. 15916 ✓

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

Placitas, Arizona.

Appellant.

vs.

GEORGE ROSEY, THE CORDON ROSES, INC., HALLMARK
PRODUCTIONS, INC., KENNETH PINK, FOX WEST COAST
FILMABLE CORPORATION, NATIONAL BROADCASTING
COMPANY, LTD. and ONE ONE ONE through TWENTY.

Appellees.

Appeal From Judgment in Favor of Appellees, of the United
States District Court, Southern District of California,
Central Division.

OPENING BRIEF OF APPELLANT.

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U. S. COURT OF APPEALS

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No. 15916

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERMAN AXELBANK,

Appellant,

vs.

GEORGE RONY, THE COPLEY PRESS, INC., HALLMARK PRODUCTIONS, INC., KROGER BABB, FOX WEST COAST THEATRES CORPORATION, NATIONAL BROADCASTING COMPANY, INC, and DOES ONE through TWENTY,

Appellees.

Appeal From Judgment in Favor of Appellees, of the United States District Court, Southern District of California, Central Division.

OPENING BRIEF OF APPELLANT.

I.

Statement of Pleadings and Facts Disclosing Jurisdiction.

Appellant, HERMAN AXELBANK, filed a Complaint [C.T. p. 2*], thereafter an Amended Complaint [C.T. p. 16*], for copyright infringement and unfair competition against the Appellees. Appellees, respectively, filed their answers [C.T. pp. 35, 41] denying the allegations

*C.T.—Clerk's Transcript.

of the Complaint and denying that the particular copyright with respect to the motion picture "TSAR TO LENIN," was owned by plaintiff but that the material involved was in public domain, and in their Answer, Appellee, GEORGE RONY, counterclaimed for libel.

Appellant sought damages against Appellees in the sum of One Million Dollars and additional damages for the alleged Appellees' (defendants') infringement of said copyright and unfair trade practices and unfair competition and also sought for an accounting of all gains, profits and advantages allegedly derived by Appellees by reason of such infringement and said unfair trade practices and said unfair competition.

A motion was made by Appellees to dismiss the Amended Complaint [C.T. p. 27] which was denied [C.T. p. 34].

At the close of the case of Appellant (plaintiff) motions were made by all of the Appellees to dismiss plaintiff's case, which was denied [R.T. p. 103].

The entire case was tried before His Honor Judge HARRY C. WESTOVER, without a jury, and periodically continued until concluded, and the Court entered a Minute Order on June 14, 1957, after submission of the case after trial. [R.T. p. 212].

The Trial Court, after Appellees had filed proposed Findings of Fact, Conclusions of Law and Judgment, to which trial counsel for Appellant filed written objections, filed the Findings of Fact and Conclusions of Law and entered judgment against Appellant, under date of July 12, 1957, [R.T. p. 226]; in which, judgment was given in favor of Appellees against Appellant, and which judgment also was entered in favor of Appellee, GEORGE RONY, on his counterclaim for libel in the sum of \$500.

Appellant filed his Notice of Appeal [R.T. p. 243], his Designation of Record on Appeal [R.T. p. 251] and his Statement of Points on Appeal.

Jurisdiction in this case, both in the United States District Court for the Southern District of California and in this Court, is patent under Title 28, U. S. Code, Section 1338, and Title 17 U. S. Code, Section 1 *et seq.*, as set forth in Complaint and Amended Complaint [R.T. pp. 2, 16].

This appeal was taken pursuant to Rule 73 Federal Rules of Civil Procedure, and as provided for in 28 U. S. C. A. Section 1291.

II.

Statement of Case.

Appellant (Plaintiff), HERMAN AXELBANK, manifested an interest in the historical and political significance eventuating in the Russian Revolution. [R.T. pp. 210-215].*

As a result, Appellant espoused the idea of a production of a historical and documentary film depicting the Russian Revolution and the events both before and afterward. From the testimony, it is clear that he devoted himself completely to this project. [R.T. pp. 214-215]. For this purpose, he acquired vast quantities or original negatives, of exposed but undeveloped film and usually from cameramen who had photographed the event, or through the agents of such cameramen.

In the trial, Appellant introduced testimony authenticating his expenditures with respect to the nature and quantity of the film which he purchases, setting forth

*R.T.—Reporter's Transcript.

the source, the amount of film purchased, and whether such film was original or not. [R.T. pp. 216-248; 270, 274; Pl. Exs. 27, 28, 29, 30, 31, 32, 33, 37 and 38].

At the trial, the Plaintiff produced the negatives of his film, which subsequently was entitled FROM TSAR TO LENIN, and proffered expert testimony that the great majority of the film were original negatives. [R.T. pp. 228; 240-241; Pl. Ex. 29]. The trial court also inspected the negatives [Pl. Ex. 34; p. 260].

With respect to duplicate negatives in his footage, Appellant testified that because the film was nitrate and subject to deterioration, duplicate negatives were made. [R.T. pp. 250-257; 258, lines 18-24].

Appellant further testified that on or about 1928, there had been accumulated approximately 360,000 feet, or approximately 370 reels of negative film, the majority of which was original, which he edited until it was reduced to approximately 25 reels, with chronological sequence. [R.T. pp. 248, 249].

Mr. Eastman, witness for Appellant, testified that during that period, to-wit, 1927-1928, Appellant entered into a written agreement under date of February 15, 1929, [Pl. Ex. 10] with Max Eastman, a distinguished teacher, lecturer and writer, and an authority on the history of the Russian Revolution, whereby Appellant and Eastman together would edit the voluminous film. [R.T. p. 50].

Accordingly, the film was turned over to Eastman and was edited by Eastman down to fourteen reels, with explanatory sub-titles. [R.T. pp. 53, 54; Pl. Ex. 11].

Both the Appellant and Eastman testified that for visual purposes in the editing of the films, the plan of animated maps was conceived to exemplify the movement

of troops during stages of the conflict. Eastman furnished Plaintiff with details of what he required, and an artist was engaged for such preparation. The original instructions were introduced in evidence. [Pl. Ex. 12, p. 59]. The receipt of the artist for his preparation of the maps was also introduced in evidence. [Pl. Ex. 41; pp. 278-280].

Plaintiff expended \$1600.00 or more in the reproduction and integration in the final fourteen reel version of the film. [R.T. p. 56; Transcript, p. 56, line 13, in error, states \$16.00].

Also, Appellant (Plaintiff), had the artist prepare black pen and ink drawings in miniature of the hammer and sickle of the Russian double eagle, and of names of various cities, which were super-imposed on the maps, which were photographed and integrated into the 14-reel version of the film. All these were introduced in evidence. [Pl. Exs. 13, 14, 15 and 25; R.T. pp. 59-61].

In 1929, Eastman made a trip to Europe, [R.T. pp. 69, 70], searching for film to fill in the gaps for continuity. [R.T. pp. 69-73]. Eastman also retained a photographer to film Kerenski in Paris and Trotsky in the Island of Principo. [R.T. p. 67].

Eastman testified that while he purchased some footage abroad, strangely, there were few shots in the libraries he visited which compared with or were similar to the material furnished to him by Plaintiff. [R.T. pp. 49-50]. Eastman testified he returned to the United States on or about December, 1929 and proceeded to edit the film, and instructed Plaintiff to have "blow-ups" made of specific scenes. This was utilized so as to have the effect of a close-up. [R.T. pp. 73-86]. Approximately,

twenty scenes were "blown up," amongst which were those of the former Czar marching with his troops; the address of Lenin to a large crowd in Uritski Square; the oration of Trotsky from the platform of a train; the address of Lenin to a crowd at the Kremlin wall; Trotsky smiling; the former Czar speaking to his body-guard; a Kerenski scene; all of which were cited in the Record. [R.T. pp. 73-86].

Some time thereafter, as Eastman testified, there were disagreements between Appellant and Eastman, which resulted in litigation wherein Eastman sought to be termed a "joint venturer." For the purpose of maintaining status quo, the New York court appointed Receivers of all of the negative and positive prints of TSAR TO LENIN, which was the 14-reel version. [R.T. p. 87].

While the matter was in receivership, on or about May 13, 1936, the then Receivers contracted with Lenauer International Films, providing for cancellation under certain conditions for distribution of the film TSAR TO LENIN. [Pl. Ex. 16; R.T. pp. 86-88]. It is apparent from this agreement and the testimony of Appellant and Eastman that this film had no sound track, musical score or narration, and was reduced to a 7-reel version. The 7-reel version had added to it a sound track consisting of a commentary and a musical score. There is no testimony by either of the parties to this lawsuit that the 14-reel version of the film was ever publicly exhibited.

While the distribution contract provided that the film "in the form in which it shall be distributed" was to be copyrighted in the names of the Receivers, this was not done. Instead, on March 10, 1937, Lenauer International Films, Inc. registered its claim to copyright to the 7-reel version, [Pl. Ex. 21; R.T. pp. 101, 102].

This film was exhibited publicly for the first time on March 6, 1937, being the date of the publication in the United States [R.T. p. 287].

Appellant testified there were further public exhibitions in 1938 and 1939, all presumably by Lenauer International Films. [R.T. p. 287].

On April 16, 1937, Lenauer International Films granted a certain Maurice Lehmann of Paris a 7-year exclusive license to distribute the French version of the film in France and other areas. [R.T. p. 288]. Pursuant to this agreement, Lehmann was obligated to return all prints or to furnish proof that the prints in his possession had been destroyed.

On March 6, 1941, in the case of *Eastman v. Axelbank*, the New York court discharged the Receivers, and appointed Plaintiff in this action as Receiver, and ordered the former Receivers to deliver to Axelbank, as Receiver, all the motion picture films, negative and positive, of TSAR TO LENIN. [R.T. pp. 89-92; Pl. Exs. 17, 18, 19, 20].

On November 9, 1952, Eastman and Axelbank settled their differences, and on November 10, 1952, Lenauer International Films, Inc. assigned the copyright to TSAR TO LENIN, including the assignment of all rights and causes of action for infringement of copyright, unfair competition, or other wrongful contracts or torts, with respect to the film, to the Receiver. [Pl. Ex. 22; R.T. p. 104], and the Receiver in turn, assigned the copyright to himself, Axelbank, as an individual. [Pl. Ex. 23; R.T. p. 120].

On February 21, 1956, the action of *Eastman v. Axelbank* was formally disposed of by the Supreme Court of the State of New York recognizing the assignment

of the copyright to Axelbank *nunc pro tunc* as of November 17, 1956, and the action was dismissed, [Pl. Ex. 59; R.T. p. 700; Pl. Ex. 20; R.T. p. 92], on February 21, 1956, which gave Appellant Axelbank the copyright and also disposed of an action which Axelbank had previously filed in 1957 in the United States District Court for the Southern District of New York, against the former Receivers and against other defendants, for the return of all negatives, sound prints, sound tracks, discs or sound records [Defendants' Ex. F; R.T. p. 578; Pl. Ex. 20; R.T. p. 92]. This litigation was terminated in 1952, at the same time that the litigation between Eastman and Axelbank had been terminated. [R.T. p. 92; Pl. Ex. 20].

In the settlement, Hays and Blackman, former Receivers, returned to Axelbank the films in their possession. Eastman surrendered all claim to any interest in the films; March of Time paid Axelbank \$3,000.00; another defendant paid \$500.00, and the remaining defendants agreed to return to Axelbank the various prints in their possession. [R.T. Pl. Exs. 20, 59; R.T. pp. 92, 700, 366; Pl. Exs. 54A, B, C and D].

On March 6, 1953, Appellant licensed the Columbia Broadcasting System to use in a nation-wide television broadcast certain footage. [R.T. pp. 337-345; Pl. Exs. 49, 50, 51, 52]. On March 8, 1953, while Appellant was waiting for the telecast of the CBS program, there was a telecast on the NBC network containing a substantial portion of Appellant's film, identical as to scenes and content with the material he had licensed to CBS. [R.T. pp. 337-345]. At the trial, it was stipulated that the NBC telecast occurred on Sunday, March 8, 1953 between 2:00 and 2:30 P. M. [R.T. pp. 207-209; Pl. Ex. 26]. It is

also admitted that approximately 15 minutes and 10 seconds of the remaining time of the film for the NBC program was furnished by Appellee Rony. It is unquestionable that the script for this telecast established that this portion of the footage supplied to Appellee NBC by Appellee Rony corresponded exactly with the footage of Appellant's film. [Pl. Ex. 26; R.T. pp. 207-209]. Appellee Rony, as president of Educational Film Enterprises, Inc., in March of 1955, entered into an agreement with Appellee KCOP for telecasting of a series under the title BACKGROUND TO BATTLE. [R.T. pp. 30-37; Pl. Exs. 3, 4, 5, 6, 7].

THE LAST CZAR, the first of these broadcasts, was telecast on May 23, 1955. [R.T. pp. 30-37]. An episode called THE BIG FRAUD was telecast on June 10, 1955, and re-run September 2, 1955 [Pl. Exs. 3, 4, 5 and 6; R.T. pp. 30-37].

It is clear that Appellee Rony's films had misappropriated Appellant's film TSAR TO LENIN. Similarly, Appellant learned that Rony's film HALF WAY TO HELL, produced by Appellee Hallmark, also infringed on Appellant's film. HALF WAY TO HELL clearly derived its footage from a film produced by Appellee Rony formerly known as BLOOD BROTHERS and before that, TOWER OF BABEL [R.T. pp. 30-37].

It must therefore be clear and unequivocal that all of the film allegedly produced by Rony, FIFTY YEARS OF HISTORY, RUSSIA 1900-1955, BLOOD BROTHERS, the episodes in BACKGROUND TO BATTLE, THE LAST CZAR and THE BIG FRAUD, all contain identical sequences with those in Appellant's film TSAR TO LENIN.

It seems to be incredible and physically impossible that defendant Rony as he testified, amassed a vast library

of documentary film in fantastic escapes from Russia and smuggled films from Russia in a coffin. [R.T. pp. 635-663]. Most importantly, it is crystal clear the blown-up picture of one of the maps used by Appellee Rony where the emblem of the hammer and sickel were superimposed, was the identical blow-up of various persons and scenes appearing in Appellant's film. The films showing Kerensky in Paris, which were specially produced for Appellant, the critical sequences of scenes, cannot be coincidental, but must be attributed to the simple and sole explanation of misappropriation. The behavior of Rony in the encounter with Appellant and Rony's insistence that Appellant merely wanted the return of his films and not money [R.T. pp. 635-663] accentuated the obligation of Appellees in this matter.

From the facts and the record, it seems clear that the Appellees misappropriated and infringed on the ownership and films of the Appellant and that the Trial Court should so have found and entered judgment for the Appellant.

The facts set forth in the Statement of the Case raise four essential questions, in which we contend that the Trial Court erred and in which we contend require that a reversal should be granted in this case.

While there are more questions involved, fundamentally this entire matter pivots on these four:—

1. Is the material contained in the films of the Appellant copyrightable and compensable for infringement?
2. Is failure to record a copyright assignment a defense to an infringer?
3. Are damages recoverable for unfair competition, even if it is conceded, for the purposes of discussion,

that the subject matter of the work may be in the Public Domain, and even though the work has been published?

4. Is the New York order recognizing Appellant's copyright, *nunc pro tunc*, valid in this case?

We should also add, of course, the issue with respect to the counterclaim, in which judgment was given for Appellee Rony:—does the testimony, and the applicable law, fail to establish libel in favor of Appellee Rony, in this case.

We submit that the answer to all these should be in the affirmative; all of these issues have been raised during the trial by objections and argument made by trial counsel for appellee, and, by objections to the proposed Findings of Fact and Conclusions of Law and Judgment, and of course, by this Appeal.

III.

Specification of Errors.

1. The Court erred in finding and ruling that the copyright on the films in question in this case did not belong to the Receivers. [F. of F., C. of L. and Judgment; C.T. p. 226].*

2. The Court erred in finding and ruling that, at the expiration of the Receivership, the return of the films in question did not carry with it the legal obligation to transfer the copyright back to the rightful owners thereof. [F. of F., C. of L. and Judgment; C.T. p. 226].

3. The Court erred in finding and ruling that the films were sold, when as a matter of fact, there was only a rental lease, or franchise arrangement; and the

*Findings of Fact—F. of F. Conclusions of Law—C. of L.

Court further erred in finding and ruling that the purchasers could do anything with said films, without regard to copyright, and without regard to plaintiff's rights and ownership. [F. of F., C. of L. and Judgment; C.T. p. 226].

4. The Court erred in failing to find and rule that Appellant, HERMAN AXELBANK, was the successor-receiver, and also was and became the owner of said film, and entitled to said copyright. [F. of F., C. of L., and Judgment; C.T. p. 226].

5. The Court erred in failing to find that in the case of *Eastman v. Axelbank*, in the United States District Court for the Southern District of New York, on or about March 6, 1941, said United States District Court for the Southern District of New York appointed in place of all Receivers involved with said film, Plaintiff and Appellant, HERMAN AXELBANK, and ordered the former Receivers, among other things, to deliver to said HERMAN AXELBANK, as Receiver, all the motion picture films, negative and positive, of TSAR TO LENIN.

6. The Court erred in failing to find that, in another action of *Eastman v. Axelbank*, on February 21, 1956, the Supreme Court of the State of New York entered a *nunc pro tunc* Order dismissing said action, and thereby recognizing Plaintiff-Appellant herein as the owner of the copyright of, and the owner of, the film TSAR TO LENIN.

7. The Court erred in failing to find that all rights to said copyright, and to said film, had, prior to this instant trial, been merged in the Plaintiff and Appellant, HERMAN AXELBANK.

8. The Court erred in failing to find and rule that the Defendant and Appellee, RONY, actually infringed on

Plaintiff-Appellant's copyright, and that as a result thereof, the use by the remaining Defendants and Appellees, constitute an infringement on Plaintiff-Appellant's copyright and ownership rights of said film; that said Court further erred in failing to find as a result thereof, that Plaintiff-Appellant suffered considerable damages.

9. The Court erred in failing to find and rule that said Defendant-Appellee, RONY, wrongfully appropriated Plaintiff-Appellant's property.

10. The Court erred in failing to find that the copyright of said film covered the entire work; and failed to find further that if any portion of said film represented non-protectible matter, Defendant and Appellee, RONY, had no legal right to utilize the same, and that the remaining defendants and appellees similarly had no legal right to use the same without the consent of Plaintiff-Appellant, and without compensating Plaintiff-Appellant for such improper use.

11. The Court erred in failing to find that, while historical facts and events in themselves are in the public domain, and may not be entitled to copyright protection, the addition of new and original material to such matters in public domain, or the application of ingenuity and originality to the compilation and presentation of material which is in the public domain, such an individual is entitled to have the entire work covered by the copyright which he may receive. The Court therefore erred in failing to find and rule that Plaintiff-Appellant, HERMAN AXELBANK, was a copyright owner and the owner of said film TSAR TO LENIN.

12. The Court erred in failing to find and rule in the first instance, that said HERMAN AXELBANK, Plaintiff-

Appellant, was an equitable owner of said film, and could sue in his own right; and further failed to find and rule that the *nunc pro tunc* Order of the New York Supreme Court cured any alleged capacity on the part of Plaintiff-Appellant to sue in his own name.

13. The Court erred in finding and ruling in favor of Defendant-Appellee, RONY, and in favor of the remaining defendants and appellees, in that such findings and rulings were not supported by evidence in the case.

14. The Court erred in granting judgment for Defendants and Appellees; and the said Court further erred in granting judgment for Defendant-Appellee, RONY, on his counter-claim for libel, since all such judgments were not supported by the evidence.

15. The Court erred in finding and ruling that Defendant-Appellee, RONY, could recover on his counter-claim for libel for the reason that the said letter involved was privileged; said letter was not libelous *per se*; and the Court further erred in failing to dismiss the counter-claim filed by Defendant-Appellee, RONY, for damages for libel.

16. The Court erred in failing to find and rule that the burden of proof on the source of defendant's film, and on the proof of Defendants right to use the same, is on said Defendants and Appellees, after Plaintiff-Appellant has established the identity of the subject, the exactness of the pictures used in all the films, and has established a *prima facie* case of appropriation.

17. The Court erred in failing to find and rule that Plaintiff-Appellant is entitled to recover damages suffered from the infringement, and that such damages include all the profits which the Defendants-Appellees have made

from such infringement, or, that said Plaintiff-Appellant was entitled, in lieu of damages and/or profits, to recover the arbitrary damages spelled out in the Copyright Code.

18. The Court erred in failing to find, and grant judgment for Plaintiff-Appellant and against Defendant-Appellees.

IV. Argument.

In this matter, the argument may be summarized as follows:

1. The Trial Court erred by its entry of judgment, contrary to the evidence and the law, in failing to find that the Appellant was the copyright owner of "TSAR TO LENIN," and that Appellees have infringed thereon.

2. The Trial Court erred in its judgment in favor of Appellees, and during the trial, in not finding that, failure to record an assignment of a copyright is not a defense to an action for infringement against an infringer.

3. The Trial Court erred in its judgment in failing to award damages to Appellant upon his complaint of unfair competition, even if the Trial Court assumed or found that some of the material was in the public domain and had been published.

4. The Trial Court erred in failing to give credence and validity to the order of the New York Supreme Court, *nunc pro tunc*, recognizing Appellant as the copyright owner of the film, "TSAR TO LENIN."

5. The Trial Court erred in finding for the Appellee, Rony, that libel had been committed awarding damages to Rony when the evidence established, that the letter

written by Appellant was privileged, and based upon the belief of the Appellant, that the facts set forth in said letter were true.

- A. The Facts and the Law Establish That Appellant, Axelbank, Was and Is the Copyright Owner of the Film, "TSAR TO LENIN," and that the Appellees (Defendants) Infringed Thereon.

The Copyright Act (17 U. S. C. 5) designates motion picture photoplays as subject to being copyrighted.

The testimony establishes that Appellant is the owner of copyright film, "TSAR TO LENIN." (See statement of case above).

There is no question that the evidence also establishes that Appellee, Rony, and, of course, the other Appellees, have infringed on this film by the telecasting and showing of various film productions, including episodes of a television series entitled "THE LAST CZAR OF RUSSIA," "THE BIG FRAUD," the film, "RUSSIA: 1900-1959," and various footage incorporated, and furnished by Appellee, Rony, into the motion picture, "HALF WAY TO HELL."

The Appellees, Hallmark Productions, Inc. and Fox West Coast Theatres Corporation, produced and exhibited "HALF WAY TO HELL." This is undenied. The Court, nonetheless, found in favor of these Appellees.

Also, Appellee, Rony, sold film material, which constituted an infringement, to NBC, who telecast the same.

Intention to infringe is not necessary to an actionable infringement.

Douglas v. Cunningham, 294 U. S. 207;

Witmark and Sons v. Calloway, 22 F. 2d 412
(D. C. Tenn. 1927).

The Trial Court substantially erred in failing to recognize the ownership and copyright of the Appellant, in pronouncing judgment against Appellant.

In *Warner's Work*, "Radio and Television Rights," at page 271, it is stated:

"The exclusive right to vend includes the right to lend, lease, or give away copyrighted works. If the copyright proprietor has disposed of his work unrestrictedly, *i.e.*, parted with the title, he is precluded from restricting its resale price or territorial use. Thus, in *Bobbs-Merrill v. Strauss*, a notice on the title page of a book purporting to limit the price at which the book would be sold at retail by future purchasers with whom there was no privity of contract was declared invalid. In other words, whenever the copyright proprietor parts with his title and ownership in a particular copy, he exhausts his statutory right to vend. The purchaser of the copy acquires 'the free mental use' of the same with the right to resell it; but the purchaser cannot multiply copies of the copy or exploit its contents for the purpose of deriving a pecuniary profit from the intellectual labor of the author."

Bobbs-Merrill Co. v. Strauss, 210 U. S. 339, 350.

See also the leading case of

International News Service v. Associated Press,
248 U. S. 215, 236 to 242.

It is clear, therefore, that Appellee, Rony, made a print, without authority, of Appellant's film and he, therefore, was liable for damages. This is indisputable, in view of the incontrovertible evidence with respect to the blow-ups and the maps [R.T. pp. 73-86] which require a finding

that Appellee Rony, copied the material owned by Appellant. The Trial Court should have definitely found as a fact, and as a matter of law, and in this respect the Trial Court seriously erred, that there was only one source for these portions of film which were identical with the material owned by Appellant. There was not an iota of documentary evidence offered by Appellee, Rony, as to the source of these particular sequences in his film. The Trial Court erred in failing to give full credit and validity to the testimony of the witness, Eastman, who stated, in effect, that proof of taking of these sequences (*i.e.* those made by Appellee, Rony) coupled with the identity of the arrangement of the critical sequences, the Peace and Bread banners and the War Victory banners showed that the source of Appellees' Russian footage could only have been from the film of Appellant.

It is respectfully urged that these errors are sufficient in themselves, as a matter of law, to require reversal of the judgment of the District Court of the United States.

B. The Trial Court Erred in Its Findings of Fact, Conclusions of Law and Judgment in Favor of Appellees; the Trial Court Seriously Erred in Failing to Find That Appellees Infringed on the Copyright of Appellant, Even Though Appellant Had Failed to Record His Assignment of the Copyright.

Appellees cannot escape their liability of infringement by the defense that Appellant failed to record his assignment of copyright.

Appellees were not bona fide purchasers from a prior registrant, but actually were tort-feasors. Failure to record an assignment by Appellant does not exculpate Appellees from liability if there has been an infringement.

This is particularly true since the Copyright Act in Section 30 (17 U. S. C. A. 30), while requiring recordation of an assignment, clearly limits the effect of failure to record as follows:

“In default of which it shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.”

Of course, Appellees were not subsequent purchasers. This has been upheld in

New Fiction Pub. Co. v. Star Pub. Co., 220 Fed. 994;

Amdur, *Copyright Law and Practise* (1936, p. 799);

Howell, *The Copyright Law* (1948, p. 159);

Warner, *Radio and Television Rights* (1953, p. 117).

C. The Trial Court Seriously Erred in Failing to Render Judgment for the Appellant; This Is True Even if the Copyrighted Work Contained Some Material Which Is in the Public Domain; This Is Also True With Respect to the Unfair Competition Committed by the Appellees. The Contract of the Receivers in This Matter, and the Lenauer International Was for 10 Years. It Provided That the Receivers Would Cause the Film to Be Copyrighted. [Pl. Ex. 16.] This Was Done in the Name of Lenauer International [Pl. Ex. 21].

At the end of 10 years Lenauer was obligated to execute an assignment to the Receivers and the copyright would revert to the true owner at the expiration of the license period.

Sunset Securities Co. v. Howard McCann, Inc.,
47 Cal. 2d 907 (1957).

In the instant case, however, Lenauer International did in fact execute an assignment to the receiver on November 10, 1952. [Pl. Ex. 22].

A copyright covers the entire material which is the subject thereto. It is true that non-protectible matter may be used by others if such others go to the commons source or are not guilty of unfair competition; but the copyrighted work may not be copied. In this case it is clear that while some facets of Appellant's films were in the public domain, the entire subject matter was eligible for, and was copyrighted.

The use by the Appellees in violation of the rights of Appellant require judgment for Appellant.

American Code Co., Inc. v. Bensinger, 282 Fed. 829, 834;

R. C. A. Mfg. Co., v. Whiteman, 114 F. 2d 86 (2d Cir., 1940);

Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 249.

See also:

International News Service v. Associated Press, 248 U. S. 215.

D. The Trial Court Erred in Failing to Give Effect to the Nunc Pro Tunc Order of the New York Supreme Court Vesting Copyright and Ownership in the Appellant.

As we have set forth in the Statement of Facts, litigation between Appellant and all individuals was settled in 1952. While the Federal case was dismissed, inadvertently the State Court action remained.

For practicality, the Receiver was not required and Appellant thereafter acted as a Receiver since all contro-

versies had been disposed of, and the film had been returned to the Appellant.

In 1956, after due motion and hearings in the New York State Court, the order was entered *nunc pro tunc* approving all the acts of the Receivers, confirming the discharge of the Receiver as of 1952 and confirming, as between all parties to that litigation, the ownership of the films by Appellant as of 1952.

There is no question that the New York Court had jurisdiction to enter such an order. There was jurisdiction over both the subject matter and the parties. All litigation thereon had ceased and all of the parties had been mutually released.

A *nunc pro tunc* order authorizing various acts, past and future, by a receiver was entered by a New York Court in *Kliger v. Rosenfeld*, 114 N. Y. Supp. 1006, 1008 (N. Y. Sup. Ct. App. Div. 1909).

It is clear, therefore, that the New York order must be deemed valid, particularly since Appellees are not parties in the New York action and cannot attack the New York order. In this, the Trial Court, in this case, has seriously erred, since the execution of the New York order vests Appellant with the ownership and copyright and should have resulted in a judgment in favor of Appellant.

E. The Trial Court Erred in Rendering Judgment in Favor of Appellee, Rony, on His Counter-claim for Libel.

This argument arises by reason of Appellees' counter-claim and as a matter of law, involves separate issues than the law of copyright.

Since there is no Federal law of libel, this phase of the argument is governed by California law.

The letter was privileged. The letter sent by Appellant was provoked by reason of the telecast of the film "THE BIG FRAUD." [Pl. Ex. 4]. The film "THE BIG FRAUD" dealt exclusively with the periods in Russia and covered footage which were identical with that contained in Appellant's "TSAR TO LENIN." Mr. Axelbank wrote to Mr. Rony and accused him of appropriating his film. This is well within the privileged area of communication. Moreover, there was no malice involved since Mr. Axelbank had never, prior to writing the letter, met Mr. Rony, and, of course, lack of malice is a complete defense.

Freeman v. Mills, 97 Cal. App. 2d 161, 167 (1950).

The letter was not libelous per se. The words "hot print" and "pirated" do not make the publication defamatory *per se*.

Babcock v. McClatchy Newspapers, 82 Cal. App. 2d 528.

The counter-claim for damages for libel should have been dismissed, at the conclusion of the case, and the judgment of the Trial Court should now be reversed.

V.

Conclusion.

In view of the foregoing, Appellant respectfully requests that the judgment of the Trial Court, rendered in favor of Appellees, and in favor of Appellee, Rony, on his counter-claim, for libel, should be reversed.

Respectfully submitted,

ALEXANDER H. SCHULLMAN,

Attorney for Appellant.

No. 15916
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HERMAN AXELBANK,

Appellant,

vs.

GEORGE RONY, THE COPLEY PRESS, INC., HALLMARK
PRODUCTIONS, INC., KROGER BABB, FOX WEST COAST
THEATRES CORPORATION, NATIONAL BROADCASTING
COMPANY, INC., and DOES ONE through TWENTY,

Appellees.

APPELLEES' BRIEF.

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No. 15916
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HERMAN AXELBANK,

Appellant,

vs.

GEORGE RONY, THE COPLEY PRESS, INC., HALLMARK
PRODUCTIONS, INC., KROGER BABB, FOX WEST COAST
THEATRES CORPORATION, NATIONAL BROADCASTING
COMPANY, INC., and DOES ONE through TWENTY,

Appellees.

APPELLEES' BRIEF.

STATEMENT OF POSITION.

Appellant is here challenging the trial court's findings of fact. In order to prevail on such a challenge, appellant must establish that those findings are "clearly erroneous."

See, *e. g.*,

Overman v. Loesser, 205 F. 2d 521, 522 (C. A. 9, 1953).

It is submitted that appellant has failed to meet this burden. Indeed, as we shall demonstrate, the trial court's findings are amply supported by the evidence adduced at the trial. Moreover, when the controlling legal principles are applied here to the facts thus found, it will be seen that the trial court's judgment was proper in all respects.

STATEMENT OF THE CASE.

Appellant's opening brief does not present an accurate and complete statement of the facts pertinent to this appeal, as required by Rule 18 (2) (c). Accordingly, in order to apprise the Court of the facts as established at the trial and as found by the trial court, we have prepared a statement of the case in accordance with the proof adduced at the trial.¹

Nature of the Action.

The present case involves an action by Axelbank against Rony and others for alleged infringement of a copyright in the film "Tsar to Lenin." [C. T. A. p. 16]. Rony filed a counterclaim for libel against Axelbank based upon a letter Axelbank had sent to Jack Heintz, an official of Television Station KCOP (hereinafter designated the "Heintz letter").² [C. T. A. p. 41].

The Film "Tsar to Lenin."

A. Nature of the Film.

The film "Tsar to Lenin," which Axelbank claims to have been infringed by defendants here, is merely an ar-

¹In the present brief, defendant and respondent George Rony will be referred to as "Rony" and plaintiff and appellant Herman Axelbank as "Axelbank."

Reference to the Reporter's Transcript on appeal will be designated by the initial "T" followed by appropriate page and line reference; reference to the Clerk's Transcript on Appeal will be designated by the initials "C. T. A." followed by appropriate page reference.

²While Axelbank makes vague references in his brief to a claim of unfair competition, no such claim was established at the trial. (See Point II, *infra*.)

rangement of a collection of newsreel and documentary films portraying a segment of Russian history surrounding the Russian Revolution of 1917, supplemented by a few charts and maps.

Axelbank testified that the motion picture "Tsar to Lenin" was compiled from "original negatives" purportedly bought from agents of the cameramen who photographed the events in question. This claim is without creditable substantiation in the record. Axelbank's witness, Max Eastman, never saw any original negatives [T. p. 52, line 14] and Eastman himself purchased in Europe on the open market prints of certain of the films used in Axelbank's motion picture [T. p. 67, line 6; p. 69, line 8], including the scenes of the Czar's swimming, etc. [T. p. 69, line 8; p. 70, line 16].

**B. Prior Publications of Material Contained in
"Tsar to Lenin."**

Prior to defendant's exhibition of their films, Axelbank had made numerous publications of the film "Tsar to Lenin," without notice of copyright. Thus, Axelbank sold outright prints of films which later were incorporated in "Tsar to Lenin." Axelbank licensed portions of "Tsar to Lenin" for exhibition without notice of copyright. Axelbank licensed the use and reuse of portions of his film for television network exhibition and had also made prior motion pictures using the same scenes and sequences as are contained in the picture "Tsar to Lenin." These motion pictures were also exhibited and published without notice of copyright. [T. p. 201, line 8; p. 380, line 10; p. 411, line 7; p. 469, line 3].

C. Appellant's Lack of Ownership.

Axelbank's claim of copyright proprietorship rests on a purported assignment from Axelbank as receiver to himself in his individual capacity in 1952. In point of fact, the assignment was ineffective when made, and as we shall point out hereafter, Axelbank's attempt to sustain that assignment by virtue of a purported *nunc pro tunc* order of a New York court, made and entered after Axelbank filed this action, is untenable. The facts with respect to the aforesaid assignment and the aforesaid *nunc pro tunc order* are set forth below (see Point ID) and we will not repeat that discussion here.

Defendants' Films.

A. Nature of the Allegedly Infringing Films.

The defendants' films, like Axelbank's, are compilations of newsreel shots and documentary photographs of Russian historical events. Like Axelbank's films, they are not staged nor performed by professional actors but are actually photographs of the events which they portray.³

Defendants' films were collected over the years by defendant Rony and assembled for exhibition in Rony's television series entitled "Background to Battle" exhibited on Television Station KCOP Los Angeles, and portions of such films were made available to defendants National Broadcasting Company and Hallmark Productions.

B. Independent Preparation of Defendants' Films.

The evidence established that defendant Rony had never seen the film "Tsar to Lenin" prior to the filing of this

³No evidence whatever with respect to defendant Fox West Coast Theatres Corporation was presented at the trial by any party.

action [T. p. 800, line 19].⁴ This fact in itself would appear sufficient to defeat Axelbank's claim of copying.

However, the trial court's findings in this regard were not premised solely on such lack of access but were supported by a mass of evidence, both oral and documentary, which established beyond question that defendants' films were the product of long years of independent research on the part of Rony. In light of the importance of this testimony to the issues involved on this appeal, it is surprising to find that Axelbank completely ignores it in his "Statement of Case." We, therefore, believe it in order to recite briefly the facts as adduced at the trial with respect to the background and preparation of defendants' films.

Defendant George Rony was born in St. Petersburg in 1905, and was present in Russia during the 1917 Russian Revolution [T. p. 653, line 1; p. 655, line 10]. He developed an early interest in motion pictures and actually photographed events occurring during the Russian Revolution [T. p. 655, line 9 *et seq*] and became an apprentice and later an employee of the Russian film industry under the aegis of the Soviet Government [T. p. 657, line 15], helping to assemble the film library of the then new Soviet Government in both Leningrad and Moscow [T. p. 657, line 19].⁵

⁴Rony had never met the plaintiff until the fall of 1955 [T. p. 797, line 8] although he had learned of plaintiff's existence upon being called to testify as an expert witness in an action which plaintiff had brought in the New York Federal District Court [T. p. 798, line 10]. Rony first learned of plaintiff's film "Tsar to Lenin" in 1952 when such expert testimony was given [T. p. 799, line 11]. Rony first saw the film "Tsar to Lenin" in 1956 [T. p. 799, line 18] after this action was filed.

⁵The Soviet Government confiscated all privately held motion pictures, including documentary films [T. p. 658, line 7].

Rony realized at an early date that documentary films of the Russian Revolution would be important for educational and historical purposes [T. p. 658, line 13]. During the course of Rony's employment in the Soviet film industry, he made plans to escape from the Soviet Union and to take prints of documentary films with him [T. p. 658, line 23, *et seq.*]⁶ (Rony was actually present when documentary films in the private collection of the Czar were located in the Leningrad Winter Palace [T. p. 661, line 5]. He obtained a print of such films at the time they were discovered by Soviet soldiers in the Winter Palace [T. p. 661, line 21].⁷

The Soviet film industry compiled catalogs and listings of documentary films produced in the Soviet Union [Deft. Exs. "L" and "M"] [T. p. 710, line 24],⁸ and prints of such documentary films were *sold outright* in the Soviet Union [T. p. 712, line 7] and were exhibited in the Soviet Union [T. p. 724, line 21]. Such films comprise a substantial portion of defendants' films about which Axelbank complains [T. p. 752, line 15; p. 753, line 15; p. 754, line 18; p. 757, line 1, *et seq.*] [See also Exs. "L", "M", "N" and "O"].⁹

⁶While working in the Soviet film industry, Rony also wrote articles on motion pictures [T. p. 766, line 6] and books on motion picture themes [T. p. 766, line 23].

⁷These films included scenes depicting the private life of the Czar and his family and documentation of religious ceremonies in which the Czar took part [T. p. 662, line 6]. (Certain of these scenes appear in Axelbank's motion picture "Tsar to Lenin").

⁸Such catalogs were introduced into evidence upon the trial of this action and contained descriptions of scenes and prices for which said films were sold in the Soviet Union [T. p. 711, line 8, *et seq.*].

⁹Such films also comprise a substantial portion of the film "Tsar to Lenin" [T. p. 712, line 25, to p. 713, line 8; p. 719, lines 2-21].

Rony left Russia in 1929 [T. p. 728, line 24], after making arrangements to have films and documents forwarded to him in Poland [T. p. 730, line 16]. Upon leaving Russia and picking up his films and documents in Danzig, Rony went to Berlin and worked in the motion picture industry in Germany [T. p. 771, lines 8-24]. While in Berlin, Rony collected other Russian historical film and newsreel footage [T. p. 775, line 5, *et seq.*]¹⁰ Rony formed his own film company in Germany and continued to collect films and produce motion pictures until Hitler came to power, at which time Rony fled from Germany [T. p. 785, line 21, to p. 786, line 4].¹¹

Rony then went from Germany to France where he produced technical and documentary films [T. p. 787, line 14].¹² While in France, Rony bought and sold newsreel and documentary films [T. p. 792, line 20 *et seq.*]. Rony finally fled France after the Germans invaded in 1940, and came to the United States, leaving behind him a vast film library of documentary films [T. 793, line 18]. Rony caused this library to be hidden and he returned to France after World War II in 1947, where he was able to locate some of his film library [T. p. 794, line 9] which he then shipped to the United States [T. p. 794, line 13].

¹⁰Some of the film viewed and purchased by Rony in Berlin was also contained in Axelbank's film "Tsar to Lenin" [T. p. 779, lines 3-22].

¹¹Rony had produced an anti-Nazi film entitled "The Wooden Cross" which film was banned by Hitler [T. p. 786, lines 11-24].

¹²In France, Rony produced a picture entitled "Tower of Babel" [T. p. 789, line 8], a documentary film depicting world history, containing film which also appears in Axelbank's motion picture "Tsar to Lenin" [T. p. 789, line 14].

While in France, Rony also compiled a movie entitled "From Lenin to Hitler" [T. p. 791, line 16]—another historical film.

After coming to the United States, Rony commenced lecturing and earned his living by making historical lectures and exhibiting certain of the films which he had brought from France [T. p. 794, line 23, *et. seq.*], including the films which Axelbank is here claiming infringe "Tsar to Lenin."

The Heintz Letter.

Rony produced a television series entitled "Background to Battle" which was exhibited on defendant Copley Press Television Station KCOP [T. p. 803, line 15]. Rony was narrator of the series and used his films in assembling the program [T. p. 804, line 5]. While the series was in progress, Rony learned that Axelbank had written a letter to KCOP suggesting that Rony had pirated Axelbank's film "Tsar to Lenin" and setting forth a violent distribe against Rony. Since this letter forms the gravamen of Rony's libel charge against Axelbank, we have set it forth *in haec verba* below.¹³

¹³"September 5, 1955

"Mr. Jack Heintz
K C O P - T V
1000 N. Cahuenga Boulevard
Hollywood, California
"Dear Mr. Heintz:

"Ironically enough, the name of last Friday evening's chapter of your series 'Background to Battle' is 'The Big Fraud.' My attorney and I sat in amazement watching your television show every shot of which was pirated from a 'hot' 16mm print of my copyrighted feature-length film 'Tsar to Lenin' which was stolen from a New York laboratory while in possession of my commentator Max Eastman, a senior editor of Reader's Digest.

"My film, which will be coast-premiered at the Marcal Theatre here very shortly, took longer to make than any other in film history. I spent most of my adult life in producing it. The actual research, foreign travel and production took over thirteen years and represents the best work of over a hundred cameramen, including Jack Reed, Harvard graduate and author of 'Ten Days That Shook The World.'

"To mention but one expense item in a big ledger full of cost figures: the trip to Europe in the summer of 1929 to film Kerensky

After learning of the Heintz letter, Rony, at the suggestion of KCOP's counsel, arranged a meeting with Axelbank [T. p. 806, line 15, *et seq*]. At such conference, Axelbank threatened Rony with this lawsuit and also threatened to harm Rony's children [T. p. 807, line 8, to p. 809, line 22].

Upon receiving Axelbank's letter to KCOP, containing its defamation of Rony and its threat of a lawsuit, Rony's program on KCOP was terminated [T. p. 739, line 8], *specifically as a result of Axelbank's letter* and the threat of this lawsuit [T. p. 739, line 12]. At the time of the trial, the program was still removed from television and has never been restored to this date.

in Paris and Trotsky on the Island of Prinkipo on the Sea of Marmora, cost over \$5,000.—and that was a mild venture compared to the deadly work of getting original 35mm negatives out from behind the 'Cordon Sanitaire' (in the years 1918-1921) when it was even more dangerous than the 'Iron Curtain'.

"We have finally found this George Rony, who in one instance during your show last Friday evening exclaims in his running commentary that he photographed that particular film (of Russian troops in Petrograd in 1917!) while admittedly he was only twelve years old! It will be interesting to learn from this witness what camera he used. The old Pathe box camera with which this shot was taken by cameraman John Dored would have out-weighted the twelve-year old Rony three to one!

"He shrewdly cut this 'hot' print up into an unrecognizable jumble of unrelated shots in a hodge-podge of picture-puzzle claptrap to evade comparison with the original from which it was pirated. The twice-duped material from this stolen 16mm print is therefore so poor in photographic quality that it scarcely resembles my original print from my original negative—which you will readily see at the Marcal Theatre soon.

"My attorney and friends who sat watching this nefarious disservice to your very fine and intelligent Los Angeles community agreed that the piracy is 100% all inclusive. Although he cut it up into an intangible mess of incoherent 'duped' hogwash, there is not one single shot of it that wasn't lifted from this 'hot' 16mm print of my copyrighted film!

"He has the gall to proclaim to a video audience of almost two million decent unsuspecting Californians in a main title: 'WRITTEN, DIRECTED AND PRODUCED by GEORGE RONY'—no less!

"This is to advise you that his claim to having risked his life and 'smuggled' the film in a coffin out of Russia is entirely false.

Trial Court's Findings and Judgment.

The trial court found that Axelbank's material was not properly subject to copyright as it was drawn from the public domain, as were defendants' films. The Court found further that defendants did not copy or take or profit from the use of any property owned exclusively by Axelbank. The trial court also found that at the time this action was filed, Axelbank was not the proprietor of a valid copyright in the motion picture "Tsar to Lenin," and that Axelbank had exhibited such motion picture with an improper notice of copyright.

The trial court further found that defendants did not compete unfairly with Axelbank.

On the basis of the foregoing findings, the trial court rendered judgment for defendants.

With respect to Rony's counterclaim for libel, the trial court found that the Heintz letter constituted libel *per*

He is a Russian refugee who received hospitality in this our fair land, on his pledge to earn his living honestly and to respect and obey our laws, though they may differ from his Russian Czarist or Stalinist laws.

"This is a very serious case of brazen piracy and copyright violation. This spurious show has been serialized on your station since last May, 1955. You are respectfully warned not to televise or in any other way shape or manner, exhibit any more of this 'hot' 16mm footage or any portion or portions thereof and to return to me promptly every foot of this stolen 16mm print, whether it be the positive 16mm print originally looted or any portion or portions thereof he has 'duped' and made dupe-prints of, whether in 16 or 35mm width.

"On the advice of my attorney I shall withhold any and all publicity on this to the major news services until you have contacted me within the time limit as hereinafter set forth.

"Unless I hear from you within 48 hours I shall instruct my attorneys to immediately file suit against all parties involved for damages and for an injunction restraining the further televising of this copyrighted film or any portion or portions thereof.

"Very truly yours,
(Herman Axelbank)"

se and that it was maliciously motivated and hence unprivileged. [C. T. A. p. 226]. Accordingly, the Court awarded Rony judgment on his counterclaim in the sum of \$500.

SUMMARY OF ARGUMENT.

The trial court's findings, amply supported by the evidence, establish that appellees did not copy any protectible portion of appellant's film. The subject matter of appellant's film, *i. e.*, historical events surrounding the Russian Revolution, is not subject to copyright protection. In fact, the only portions of appellant's film which could possibly have been entitled to copyright protection were its sequence of development and a commentary by Max Eastman, neither of which were copied by appellees.

Moreover, any rights which appellant may have had in his collection of newsreel films were abandoned by publication with an improper designation of appellant as copyright proprietor.

Finally, appellant failed to establish the requisite interest in the copyright upon which he purports to sue.

Accordingly, the trial court properly rendered judgment for appellees on appellant's claim of copyright infringement and unfair competition.

With respect to appellee Rony's counterclaim for libel, the trial court's findings, amply supported, by the evidence, establish the propriety of the trial court's judgment in favor of Rony. The Heintz letter, upon which the libel claim is based, clearly constituted libel *per se*. Moreover, that letter was maliciously motivated and hence unprivileged.

ARGUMENT.

I.

Appellant Has Failed to Establish a Claim for
Copyright Infringement.

- A. The Plaintiff in an Action for Copyright Infringement Has the Burden of Establishing That the Defendant Has Infringed Plaintiff's Work by Copying a Substantial Portion of the Protectible Material Contained Therein.

Harold Lloyd Corporation v. Witwer, 65 F. 2d 1
(C. C. A. 9, 1933);

Hirsch v. Paramount Pictures, 17 Fed. Supp.
816 (S. D. Cal. 1937) (Yankwich, J.).

1. *In Order to Prove a Claim of Copyright Infringement, Plaintiff Must Establish That Defendant Has Copied a Substantial Portion of Plaintiff's Work.*
-

Hirsch v. Paramount Pictures, supra, 17 Fed.
Supp. 816.

In order to establish that there has been copying, plaintiff must demonstrate that there are marked similarities between the two works. The determination whether such similarities exist is basically a question for the trier of facts.

Hirsch v. Paramount Pictures, supra, 17 Fed. Supp.
816.

See also:

Funkhouser v. Loew's, Inc., 208 F. 2d 185 (C. A.
8, 1953).

The applicable standard has been stated as follows in *Funkhouser v. Loew's, Inc.*, *supra* (208 F. 2d 188):

“ . . . the test used to determine infringement in cases of this kind is whether ordinary observation of the motion picture photoplay would cause it to be recognized as a picturization of the compositions alleged to have been copied, and not whether by some hypercritical dissection of sentences and incidents seeming similarities are shown to exist. . . .”

Moreover, while a claim of infringement will automatically fail where similarity is lacking, the mere presence of similarities does not necessarily suggest infringement where those similarities are explainable in terms of the treatment necessarily accorded the common subject matter.

See, *e.g.*:

Dorsey v. Old Surety Life Ins. Co., 98 F. 2d 872 (C. C. A. 10, 1938);

Oxford Book Co. v. College Entrance Book Co., 98 F. 2d 688 (C. C. A. 2, 1938);

Harold Lloyd Corporation v. Witwer, *supra*, 65 F. 2d 1 (C. C. A. 9, 1933).

Thus, where the materials involved are mere narratives of historical events, similarities between the two works may be attributed to the fact that both were obtained from a common source.

Greenbie v. Noble, 151 Fed. Supp. 45 (S. D. N. Y. 1957);

Echevarria v. Warner Bros. Pictures, 12 Fed. Supp. 632, 638 (S. D. Cal. 1935);

Oxford Book Co. v. College Entrance Book Co., *supra*, 98 Fed. 2d 688.

As noted in *Echevarria v. Warner Bros. Pictures, supra* (12 Fed. Supp. 638):

“One cannot build a story around a historical incident and then claim exclusive right to the use of the incident.”

Again, in *Oxford Book Co. v. College Entrance Book Co., supra*, the court observes (98 F. 2d 691):

“. . . The true concept of what a copyright covers as well as what it does not was given by Judge Learned Hand in *Arnstein v. Edward B. Marks Music Corp., supra*, when he said, ‘The “sole liberty of printing, publishing and vending” the “work” means the liberty to make use of the corporeal object by means of which the author has expressed himself; it does not mean “the sole liberty” to create other “works,” even though they are identical.’ This applies with especial force to works on the same period in history. The subject matter is of necessity what events have made it and the order of treatment whether that be chronological or topical is fixed by the facts. . . .

For the foregoing reasons no need exists for analyzing in detail the fairly numerous places in the text in each book where substantially the same thing on the same subject has been said in different words. That was proper enough and, indeed, inevitable if both books were to serve their purpose. They had to contain the more important facts of history. This being so, no sound reason remains for saying that the accused book in its text is a copy of any substantial part of the copyrighted book. . . .”

2. *Where Only Portions of a Copyrighted Work Are Protectible, the Question of Infringement Must Be Determined Solely With Reference to Whether There Has Been Substantial Copying of the Protectible Portions of the Work.*

Chamberlin v. Uris Sales Corporation, 150 F. 2d 512 (C. C. A. 2, 1945);

Lake v. Columbia Broadcasting System, 140 Fed. Supp. 707 (S. D. Cal. 1956).

Thus, where a copyright is obtained upon a collection of materials, some of which have been previously published, the copyright protects only that which is original in the new collection.

Andrews v. Guenther Pub. Co., 60 F. 2d 555, 557 (S. D. N. Y. 1932).

B. The Trial Court's Findings, Amply Supported by the Evidence, Establish That Appellees Did Not Copy Any Protectible Portion of Appellant's Film.

1. *The Subject Matter of Appellant's Film, i.e., the Historical Events Surrounding the Russian Revolution, Is Not Subject to Copyright Protection.*

(a) Historical Facts and Events in Themselves Are in the Public Domain and Are Therefore Not Entitled to Copyright Protection.¹⁴

¹⁴The mere fact that a copyright is obtained for a given work does not establish that the material contained therein is in fact copyrightable.

See, e.g.:

Eggers v. Sun Sales Corporation, 263 Fed. 373 (C. C. A. 2, 1920).

Lake v. Columbia Broadcasting System, supra,
140 Fed. Supp. 707;

Greenbie v. Noble, supra, 151 Fed. Supp. 45
(S. D. N. Y. 1957);

Curtis v. Time, Inc., 147 Fed. Supp. 505 (Dist.
Col. 1957) (Aff'd 251 F. 2d 389);

Caruthers v. R. K. O. Radio Pictures, 20 Fed.
Supp. 906 (S. D. N. Y. 1937).

As stated in *Curtis v. Time, Inc., supra* (147 Fed.
Supp. 505-506):

"No one has a right of property in a historical or biographical event. Any one may publish biographies or photographs of winners of the Congressional Medal of Honor, of Presidents of the United States, of Senators, Congressmen, or other public officials, or other public figures. Any one may publish narratives of historical events. For instance, in the past two or three years we have had a number of histories of the Civil War. No one can have a monopoly on the idea of publishing a history of particular wars or of any other events. . . ."

Again, in *Lake v. Columbia Broadcasting System, supra*, the court states (140 Fed. Supp. 709):

". . . the only similarity between the radio program and the copyrighted book is in the sequence of the claimed historical events and in a few instances the content of the dialogue, although the wording of the conversations which purportedly took place among the characters included in the common incident depicted is not the same; . . .

“ . . . accordingly plaintiff does not assert a claim which is actionable under the copyright statute; . . . ”

The court, in holding that a historical novel did not infringe on a prior biography dealing with the same historical character, observed in *Greenbie v. Noble, supra* (151 Fed. Supp. 65, 66):

“It is well settled that the facts concerning the actual life of an historic character are in the public domain and are not entitled to copyright protection. . . .

. . .

“There is no copyright of facts news or history.

. . .

. . .

“The fact that plaintiff’s biography was published before the defendant’s novel does not give plaintiff a monopoly of the subject matter, since, unlike the law of patents, ‘mere priority in time does not confer a monopoly.’ . . .

“By drawing upon materials and information from sources available to all, an author does not thereby obtain the right to exclude others from using the same materials.”

“It is true that infringement may result from copying a work which is based upon material in the public domain. But this happens only when the material so taken has been transformed by the first taker or borrower as to entitle him to a claim of originality.”

Hirsch v. Paramount Pictures, supra, 17 Fed. Supp. 816, 818.

See also:

Andrews v. Guenther Pub. Co., *supra*, 60 F. 2d 555, 557.¹⁵

(b) The Subject Matter of Appellant's Film Is Not Subject to Copyright Protection.

The Court found that the motion picture films exhibited by the defendants and which were claimed by Axelbank to have infringed upon Axelbank's rights were drawn from the public domain [C. T. A. p. 226]. Similarly, the Court found that Axelbank's motion picture "Tsar to Lenin" was also compiled from the public domain. This finding was amply supported by the evidence, as both Axelbank's witness, Max Eastman, and defendant Rony testified that newsreel films of the happenings during the period surrounding the Russian Revolution were freely bought and sold throughout the markets of the world and that prints thereof were generally available.¹⁶

¹⁵The cases cited by appellant do not suggest a contrary view.

Thus, in *Bobbs-Merrill Company v. Straus*, 28 S. Ct. 722 (1908), the Court merely held that a copyright does not entitle its holder to control resale price, a problem which is in no way involved in the instant case.

Again, in *Bleistein v. Donaldson Lithographing Co.*, 23 S. Ct. 298 (1903), the Court held that pictorial illustrations are subject to copyright—hardly the situation with which we are here concerned.

¹⁶It should be understood that defendants make and have made no claim of exclusive ownership. They freely assert that Axelbank has as much right to use the film materials contained in "Tsar to Lenin" as defendants have to use the same materials in their motion pictures and television broadcasts. Both were drawn from a common source, to-wit: the public domain.

American Code Co. v. Bensinger, 282 Fed. 829 (C. C. A. 2, 1922), which involved the copyright of a telegraph code, is actually authority for appellees rather than appellants, for in that case the court expressly recognized the propositions which respondents are urging here.

2. *The Only Portions of Appellant's Film Which Could Possibly Have Been Entitled to Copyright Protection Were Its Sequence of Development and the Commentary of Max Eastman, Neither of Which Were Copied by Appellees.*
-

In the preceding section we have pointed out wherein the historical events which form the subject matter of appellant's film were not subject to copyright protection. Aside from the subject matter, the components of appellant's work may be classified as follows:

(a) A series of newsreel films depicting events surrounding the Russian Revolution.

(b) A few maps for which appellant claims credit.

(c) The way in which the individual scenes and sequences were put together, *i.e.*, the sequential development.

(d) The commentary of Max Eastman.

When the foregoing elements are analyzed in the light of the trial court's findings and the evidence in support thereof, it is clear that respondents have not copied any protectible portion of appellant's film.

(a) The Trial Court Properly Found That the Newsreel Films Collected by Appellant Were Not Copied by Respondents. Moreover, The Newsreel Films in Question Were in the Public Domain by Virtue of Prior Publication Without Copyright.

It is clear that appellant could not ground a claim of copyright infringement upon any alleged copying by respondents of the newsreel films collected by appellant.

First of all, the trial court's findings, amply supported by the evidence, establish that respondents did not copy the films in question, but instead obtained the films through extensive independent efforts.

Rony, both by testimony and through documentary evidence, demonstrated that the films used by the defendants were collected through independent efforts. Some Rony brought with him from Russia, some he bought in Germany, others in France, and some he photographed himself. The uncontroverted testimony is that Rony did not copy Axelbank's film and had never seen such film until after this action was filed [T. p. 799, line 18]. This, it appears that not only was Axelbank's film unprotectible but it was not in fact copied by defendants.

Secondly, the newsreel films which appellant used in his film "Tsar to Lenin" were in the public domain by virtue of prior publication without copyright.

Even had there been any protection for Axelbank's material, it was waived by prior and extensive publication by Axelbank without copyright. Axelbank admitted he had made prior motion pictures incorporating the same footage and sequences as are contained in the picture "Tsar to Lenin" and published these without notice of copyright [T. p. 411, line 13; p. 488, line 13; p. 521, line 20; p. 533, line 1; p. 558, line 14]. In addition, Axelbank licensed the use and reuse of the film for television [T. p. 469, line 3]. Finally, the first version of Axelbank's film was published without notice of copyright [T. p. 380, line 10, *et seq.*].¹⁷

¹⁷It should be noted that Axelbank has never contended that there are any invented or directed scenes in his motion picture but acknowledges that it is (with the exception of a few maps and charts) essentially a newsreel [T. p. 528, line 16].

The evidence establishes that the individual scenes and sequences contained in the film "Tsar to Lenin" had been sold and resold throughout the world for a period of years prior to plaintiff's acquisition thereof. Thus, appellant himself testified that prior to the completion of the film, "Tsar to Lenin," he had sold most, if not all, of the sequences later included in the film. Among these sales were the following:

(1) Numerous outright sales to newsreel companies of footage later used in "Tsar to Lenin" [T. p. 380, line 21];

(2) Sale of at least 4,000 feet of film to the Soviet Government (all claimed to be original negatives) [T. p. 411, line 13];

(3) Over 1,000 feet of film of Russian historical events included in a motion picture entitled, "The Last of the Czars," admittedly distributed by Axelbank without notice of copyright [T. p. 411, line 13; p. 488, line 13; p. 530, line 1; p. 531, line 20; p. 558, line 14];

(4) Over 3,700 feet of film of Russian historical events included in a motion picture entitled "The Truth about Russia," admittedly distributed by Axelbank without notice of copyright [T. p. 488, line 13].

Appellant further testified that material from each of these sources was also included in "Tsar to Lenin." He was completely uncertain as to the amount of such footage used in "Tsar to Lenin" and the speculative nature of his testimony as to how much of the film later appeared in "Tsar to Lenin" almost requires the conclusion that all of what was to become "Tsar to Lenin" was included in appellant's prior sales of Russian footage.

Under such circumstances, it is clear that the materials included in "Tsar to Lenin," even if originally copy-rightable, had long since become a part of the public domain.

See, *e.g.*:

Egner v. E. C. Schirmer Music Co., 139 F. 2d 398 (C. C. A. 1, 1943);

Snow v. Laird, 98 Fed. 813 (C. C. A. 7, 1900);

Davis-Robertson Agency v. Duke, 119 Fed. Supp. 931 (E. D. Va. 1953);

Basevi v. Edward O'Toole Co., 26 Fed. Supp. 41 (S. D. N. Y. 1939).

Thus, in *Davis-Robertson Agency v. Duke*, *supra*, the court states (119 Fed. Supp. 934):

"The evidence discloses that many of the 'cuts' which the defendant contends were copied by the plaintiffs were published by the defendant prior to any attempt on the part of the defendant to copy-right them. This would vitiate a copyright subsequently obtained thereon. . . ." ¹⁸

Appellant's only answer to this obvious defect in his claim is a statement that a copyright owner may sell a copy of his work without impairing his right to prevent others from reproducing it. But this general principle has no application to the present case, for it relates solely to *sales made after copyright protection has been obtained*, in which event prevention of reproduction is the very essence of copyright protection. It has no applica-

¹⁸Appellant could not avoid the effect of the foregoing rule by mere minor alterations in the materials previously published.

See,

Snow v. Laird, *supra*, 98 Fed. 813.

tion whatever to a situation in which *copies are sold prior to copyright*. In the latter case the work is thereby dedicated to the public so that it may not thereafter become a proper subject of copyright protection. That is precisely what happened in the instant case.

(b) Appellant's Maps and "Blow-ups" Were Not Subject to Copyright Protection. Moreover, the Trial Court Properly Found That There Was No Copying of Such Maps and Blow-ups by Respondents.

It is well established that there can be no copyright protection for a map unless its creation involves sufficient original work to warrant protection.

Amsterdam v. Triangle Publications, 189 F. 2d 104 (C. A. 3, 1951);

Andrews v. Guenther Pub. Co., *supra*, 60 F. 2d 555;

Marken and Bielfeld, Incorp. v. Baughman Co., 162 Fed. Supp. 561 (E. D. Va. 1957).

Thus, in *Amsterdam v. Triangle Publications*, *supra*, the court, after noting that a plaintiff cannot copyright "the arbitrary color schemes, symbols or numbers that he uses on his map" (189 F. 2d 106), explains the necessity for original effort as follows (189 F. 2d 106):

" . . . The presentation of ideas in the form of books, movies, music and other similar creative work is protected by the Copyright Act. However, the presentation of information available to everybody, such as is found on maps, is protected only when the publisher of the map in question obtains originally some of that information by the sweat of his own brow. . . ."

Again, in *Marken and Bielfeld, Incorp. v. Baughman Co., supra*, the court observes (162 Fed. Supp. 562-563):

“ . . . While it is not required that the compilation be the sole product of the maker, it is clear that something more than the compilation of information procured by others is required to make a map copyrightable. There must be originality resulting from the independent effort of the maker in acquiring a reasonably substantial portion of the information. . . . ”

In the instant case the trial court was certainly entitled to conclude that the map in question did not contain sufficient original work to warrant protection. In fact, it is difficult to see how any other conclusion could have been reached. Moreover, the maps in question were not subject to copyright protection because they had been sold and published by appellant prior to copyright. (See point a, *supra*) [T. p. 201, line 8; p. 203, line 9].

Even assuming, arguendo, that appellant's maps were protectible, the trial court properly found that there was no copying of them by respondents.

There is no evidence whatever that the maps which Axelbank claims were original were copied by any of the defendants. Further, the evidence clearly demonstrates and the court found that, as a matter of fact, no copying was done by defendants. The mere fact that similar maps may have appeared in Axelbank's and defendants' films did not require the trial court to find that there had been copying. On the contrary, it was freely admitted by defendants that much of their material was similar, if not identical, to Axelbank's. However, it is equally clear that Axelbank's entire motion picture was available

piecemeal and otherwise in the film markets of the world.

(c) Defendants Did Not Copy Axelbank's Sequential Development.

In any historical treatment of the events surrounding the Russian Revolution, one would necessarily expect to find certain similarities in sequence arising from the very nature of the subject matter. Accordingly, even if there had been similarities of a pronounced nature in the respective sequential treatment of this historical material by Axelbank and Rony, that would hardly afford convincing evidence that Rony had copied Axelbank's work.

In the instant case, however, it is not even necessary to resort to such a principle, for the findings, amply supported by the evidence, establish that there was no marked similarity in the sequential development of the two works.

Axelbank, by his own testimony and his letter to Heintz, has demonstrated that defendants' pictures were not similar to Axelbank's, particularly in the matter of sequential treatment. Thus Axelbank, in his letter to Heintz [C. T. A. p. 4], states of Rony:

"He shrewdly cut this 'hot' print up into an unrecognizable jumble of unrelated shots in a hodge-podge of picture-puzzle clap-trap to evade comparison"

and further states of Rony's film ". . . it scarcely resembles my original print from my original negative." Thus, Axelbank himself has acknowledged the obvious lack of merit in his claim of similarity.

(d) Max Eastman's Commentary.

The remaining element of appellant's film is the commentary of Max Eastman. The evidence establishes beyond question that respondents did not copy any portion of this commentary, and therefore no claim of infringement will lie on that ground.¹⁹

C. Any Rights Which Appellant May Have Had in His Collection of Newsreel Films Were Abandoned by Publication With an Improper Designation of Appellant as Copyright Proprietor.

The evidence established that appellant published "Tsar to Lenin" with the following copyright designation: "Herman Axelbank 1937." In fact, Axelbank was not the copyright proprietor either in 1937 or at the date of such publication (See Point ID, *infra*). By virtue of such publication, appellant lost any copyright protection which may have existed in the film.

Group Publishers v. Winchell, 86 Fed. Supp. 573 (S. D. N. Y. 1949).

In *Group Publishers v. Winchell*, *supra*, the court held that substitution of the name of an assignee in a notice of copyright, prior to the recordation of the assignment, results in an abandonment of the copyright and a dedication of the work to the public. In so holding, the court declared (86 Fed. Supp. 577):

"The Congressional policy reflected in the statute is that the notice of copyright shall contain, as proprietor, the name of the holder of record; for indis-

¹⁹In *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (C. C. A. 2, 1940), cited by appellant, the court was merely concerned with whether a purchaser of records could be enjoined from making radio broadcasts of them. It is difficult to see how appellant can purport to derive support from such a case.

criminate substitution could result in considerable confusion and would not 'sufficiently aid in tracing * * * title if need be.' *Fleisher Studios v. Ralph A. Freundlich, Inc.*, *supra*, 73 F. 2d at page 277.

"Plaintiff claims that the words of Section 32 are merely permissive or hortatory and do not prohibit an assignee, absent recordation, from freely substituting his name in the notice of copyright for that of the assignor. But to put this interpretation on the language of that section completely emasculates the provision and renders its inclusion within the act meaningless; for the section would serve no purpose if the assignee could, with equal force, substitute his name for that of the assignor prior to recordation.

"The interpretation just given has been the considered construction of Section 32 given by authorities in the field of copyright law and seems the only consistent interpretation which will give meaning to the language of the provision. Having substituted the name 'Group Publishers, Inc.' in the copyright notice before recordation of the assignment of the copyright to it, plaintiff may no longer assert rights under the copyright and defendant's motion for summary judgment must be granted. . . ."

Likewise, in the present case Axelbank himself testified that he placed upon his film a purported copyright notice "Copyright Herman Axelbank 1937" [T. p. 434, line 6], and admits that he has exhibited the film with said designation since 1953 [T. p. 434, line 10]. There is no evidence whatever that Axelbank had any copyright in 1937 and certainly none that the motion picture was ever exhibited prior to 1952 with an appropriate

notice of copyright. The record is totally devoid of any evidence that Axelbank had any copyright in 1937. His designation "Copyright Herman Axelbank 1937" was wholly fictitious and the trial court properly so found [C. T. A. p. 226]. Axelbank's own testimony and evidence demonstrate that the copyright was not even purportedly assigned to Axelbank until 1956 through the device of a *nunc pro tunc* order made by a New York court *after this action was filed* (See Point ID, *infra*).

D. Appellant Is Not the Real Party in Interest and Therefore May Not Recover in Any Event.

1. *A Claim for Copyright Infringement Must Ordinarily Be Brought by the Copyright Proprietor. At the Very Least, the Copyright Proprietor Is Normally an Indispensable Party to Such an Action.*
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Alexander v. Irving Trust Company, 132 Fed. Supp. 364 (S. D. N. Y. 1955) (Aff'd 228 F. 2d 221).

Cf.

Goldwyn Pictures Corporation v. Howells Sales Co., 282 Fed. 9 (C. C. A. 2, 1922);

Eliot v. Geare-Marston, Inc., 30 Fed. Supp. 301 (E. D. Pa. 1939).

Thus, in *Alexander v. Irving Trust Company*, *supra*, the court states (132 Fed. Supp. 369):

"It is well settled that in an action for infringement of copyright, the copyright owner is an indispensable party. . . ."

The foregoing rule is well supported in logic and in justice. If the law were otherwise, an alleged infringer would be put to the risk of defending suits for the same wrong by both the legal proprietor and the equitable proprietor. The requirement that all parties be present before the court avoids a multiplicity of suits.

In addition, in the absence of the legal proprietor of the copyright there is no way to contravene or disprove the alleged equitable owner's allegations with respect to how he came by his equitable title. Such findings of fact as may be made are manifestly not binding upon the legal proprietor unless he is a party to the suit. The result for which appellant argues would achieve not only a multiplicity of suits, but conceivably a multiplicity of liabilities.

The cases cited by appellant do not suggest a contrary view.

In *New Fiction Publication Co. v. Star Co.*, 220 Fed. 994 (S. D. N. Y. 1915), the sole question involved was whether the plaintiff was an assignee or licensee. The court held that since there was not a full assignment, the plaintiff did not have sufficient interest to be the copyright proprietor. Hence, the case is authority for appellees rather than appellant.

Sunset Securities Co. v. Coward McCann, Inc., 47 Cal. 2d 907, 306 P. 2d 777 (1957), cited by appellant, is completely out of point here, for that case was concerned solely with the construction of the language of a licensing agreement and has no bearing on the instant case.

2. *Appellant Failed to Establish the Requisite Interest in the Copyright Upon Which He Purports to Sue.*

Axelbank's claim of copyright proprietorship is based upon an alleged assignment made by Axelbank as receiver to himself in his individual capacity in 1952. In point of fact, however, the evidence adduced at the trial establishes, as the trial court properly found, that no effective assignment was made in 1952, or indeed, at any time prior to the filing of the present action.

First of all, under the order of the New York Court of March 6, 1941 appointing Axelbank as successor-receiver (without bond) in a proceeding relating to the film "Tsar to Lenin," Axelbank was empowered:

" . . . to receive, preserve, and administer the subject matter of this action . . . with power to do each and every act necessary and proper for the public presentation of said film, and to negotiate and make contracts with respect to said film and the public exhibition thereof, provided, however, *that the said receiver shall incur no obligations, contractual or otherwise, with respect to the sale or lease of said film, other than upon contracts directly with theater exhibitors made in the ordinary course of business, except upon the order of this Court* after at least five (5) days notice of motion served personally upon Max Eastman and Samuel Malitz" (Emphasis added).

Thus, by the very terms of the order under which plaintiff was appointed receiver, it is perfectly evident that he had no authority to make an assignment of the copyright to himself *except upon court order*.

Under New York law, action taken by a receiver in the absence of a court order, where such order is required, is void.

See, *e.g.*:

Alexander v. Valumet Chocolate Co., 266 N. Y. Supp. 15, 240 App. Div. 769 (1933);

Simmons v. Woods, 45 How. Prac. 262 (N. Y. Sup. Ct. 1873).

Thus, in *Simmons v. Wood*, *supra*, the court observes (45 How. Prac. 268):

“The *ex parte* order of December 16, 1869, appointing the receiver, contained an authority to him to sell at public or private sale, in his discretion, the grants, franchises and property in question, with this express reservation, ‘*subject to the orders of this court.*’ No transfer of the interests sold could, therefore, properly be made by the receiver until his report of sale was made and an order of confirmation granted on notice to the parties who had appeared in the action. Any transfer before such confirmation would be unauthorized;”

Thus, it is clear that the purported assignment of the copyright to appellant was a nullity as of the time it was made, in the absence of a court order authorizing it.

It is equally clear that the order of the New York Court of February 1956 cannot serve to validate that assignment nunc pro tunc so as to vest a proprietary interest in the copyright in appellant as of an earlier date, for the New York courts have repeatedly held that a nunc pro tunc order may not be used to record a fact as of a prior date, when it did not then exist.

See, e.g.:

In the Matter of Inez Yancey, 307 N. Y. 858,
122 N. E. 2d 746 (1954);

Merrick v. Merrick, 266 N. Y. 120, 194 N. E.
55 (1934);

Stock v. Mann, 255 N. Y. 100, 174 N. E. 76
(1930);

*Guarantee Trust and Safe Deposit Co. v. Phila-
delphia, Reading and New England Railroad
Company*, 160 N. Y. 1, 54 N. E. 575 (1899);

Smith v. New York Cent. R. Co., 183 App. Div.
478, 171 N. Y. Supp. 64 (1918).²⁰

Thus, in *Guarantee Trust and Safe Deposit Co. v. Philadelphia, Reading and New England Railroad Company*, *supra*, the court states the controlling rule as follows (160 N. Y. 7):

“ . . . The theory upon which an order may be granted to take effect as of a previous date, is that some ruling has been made which was not properly, or was improperly, entered. A court has no power to have a new order or ruling so entered, thus bringing into the record an element which did not previously exist. The facts must exist, and then if the record of them is imperfect or incomplete, it may be amended, but if the record shows the actual facts then no order can be properly made changing them so as to take the place of an act that was required to be previously performed. *While a court may record existing fact nunc pro tunc, it can-*

²⁰See also, *Mohrmann v. Kob*, 291 N. Y. 181, 51 N. E. 2d 921 (1943), *Gravino v. Gravino*, 3 A. D. 2d 641, 158 N. Y. S. 2d 130 (1956), *In re MacEwan's Estate*, 280 App. Div. 193, 112 N. Y. S. 2d 644 (1952), *Dusch v. Dusch*, 167 Misc. 449, 4 N. Y. S. 2d 49 (1938) (aff'd 257 App. Div. 909, 12 N. Y. S. 2d 252).

not record a fact as of a prior date when it did not then exist . . .” (Emphasis added).

Again, in *Stock v. Mann*, *supra*, the court held that a foreign conservator of the estate of a non-resident incompetent could not be appointed *nunc pro tunc* as committee of her property in the State of New York so as to validate the conservator’s prior authorization of an appearance for the incompetent in a New York action.

Similarly, in *Smith v. New York Cent. R. Co.*, *supra*, the court, in holding that the court below could not appoint an administratrix *nunc pro tunc* so as to validate the bringing of an action by her prior to her appointment, explained (171 N. Y. Supp. 66):

“The plaintiff was not the administratrix when the action was commenced, and no subsequent order can change that fact. As was said in *Guarantee Trust Co. v. P., R. & N. E. R. R. Co.*, 160 N. Y. 1, 54 N. E. 575:

“While a court may record an existing fact *nunc pro tunc*, it cannot record a fact as of a prior date when it did not then exist.’”²¹

²¹The federal courts have recognized that the foregoing rule represents the established law of the State of New York.

See,

Daine v. Commissioner of Internal Revenue, 168 F. 2d 449 (C. C. A. 2, 1948);

Kliger v. Rosenfeld, 130 App. Div. 421, 114 N. Y. Supp. 1006 (1909), cited by appellant, does not suggest a contrary view. The *Kliger* case merely involved a *nunc pro tunc* order authorizing a receiver to pay certain debts which had already been paid, on the ground that “he should not now be compelled to be at a loss, merely because his counsel advised him erroneously and failed to protect him by applying for an order permitting the payment.” (114 N. Y. Supp. 1008.) The court observed that it was “unwilling to absolutely cut the receiver off from any opportunity to protect himself and defend the payments made by him.” (114 N. Y. Supp. at 1008.) That is hardly the case with which we are confronted here.

The application of these rules to the case at bar is obvious. In the instant case, *no order or judicial determination had been made* in 1952 vesting copyright proprietorship in Axelbank. *No order of judicial determination had been made* in 1952 approving an assignment from Axelbank as receiver to Axelbank as an individual. *No order or judicial determination had been made* in 1952 so far as appears determining these vital issues in any manner whatsoever, either favorably to Axelbank or unfavorably to him. Axelbank had not even in fact executed the proposed assignment. What is contended for now by plaintiff is that a New York Court in 1956 can sanctify plaintiff's efficient hindsight by validating for plaintiff *acts performed in* 1956. It is not even contended by plaintiff that these acts were done (as required by the rule set forth) at an earlier date and simply not made of record. Plaintiff admits that these acts were not done until 1956. Plaintiff in short has asked the New York court to create a new fact (copyright proprietorship in Axelbank) which did not exist in 1952.

In short, to paraphrase the language of the *Smith* case, *supra*, "the plaintiff was not the [copyright proprietor in 1952], and no subsequent order can change that fact.

II.

Appellant Has Failed to Establish His Claim of
Unfair Competition.

It is rather surprising to find appellant urging at this late stage of the proceedings that respondents were guilty of unfair competition, in light of the fact that appellant clearly failed to prove this claim at the trial. In any event, it is clear that no claim of unfair competition was established.

The essence of an unfair competition claim consists of the passing off of one's products as those of another.

American Philatelic Society v. Claibourne, 3 Cal. 2d 689, 46 P. 2d 135 (1935).²²

Thus, in *American Philatelic Society v. Claibourne*, *supra*, the court states (3 Cal. 2d 697):

“ . . . The case books are replete with cases which hold that the essence of unfair competition lies in the simulation and imitation of the goods of a rival or competitor with the purpose of deceiving the unwary public into buying the imitation under the impression that it is purchasing the goods of such competitor. . . . ”

In the present case this essential element of unfair competition is obviously lacking. Thus, there is no allegation of any attempt on the part of the respondents to pass off their goods as those of the appellant. On the contrary, as heretofore noted (Point IB2(c), *supra*), appel-

²²*Cf. Heckenkamp v. Ziv Television Programs*, 157 Cal. App. 2d 293, 321 P. 2d 137 (1958).

lant has asserted that Rony's work is so dissimilar from his own as to be almost unrecognizable; and if appellant has difficulty in perceiving any similarity between the two works, certainly it is not likely that the public would be deceived.²³

International News Service v. Associated Press, 248 U. S. 215 (1918), cited by appellant, does not suggest a contrary view, for as Judge Learned Hand observes in *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (C. C. A. 2, 1940) (referring to the *Associated Press* case), "That much discussed decision really held no more than that a western newspaper might not take advantage of the fact that it was published some hours later than papers in the east, to copy the news which the plaintiff had collected at its own expense. In spite of some general language it must be confined to that situation . . ." (114 F. 2d 90).²⁴

²³Moreover, since appellant's claim of unfair competition is based essentially on the same facts as appellant's claim of copyright infringement, the trial court's adverse findings on those facts, which are amply supported by the evidence, are fatal to both claims. See, e.g., *Alexander v. Irving Trust Company*, *supra*, 132 Fed. Supp. 364, 368. Cf., *Lake v. Columbia Broadcasting System*, *supra*, 140 Fed. Supp. 707, 709.

²⁴Again, in *Alexander v. Irving Trust Company*, *supra*, the court notes (132 Fed. Supp. 368):

"Plaintiff asserts that she has a right to the protection of her material independently of copyright on the theory of *International News Service v. Associated Press*, 1918, 248 U. S. 215, 39 S. Ct. 68, 63 L. Ed. 211,—a decision involving a news gathering service where protection was given against the raiding of news services supplied by the plaintiff. This so-called 'free ride' doctrine has been limited to cases where an attempt is made to secure an unfair advantage of the character proscribed in the *Associated Press* case. . . ."

III.

The Trial Court's Findings, Amply Supported by the Evidence, Establish That Appellee Rony Was Properly Awarded Judgment on His Counterclaim for Libel.

Preliminary statement.

Axelbank, on September 5, 1955, wrote a letter to Mr. Jack Heintz of Television Station KCOP, in which he accused Rony of pirating the film "Tsar to Lenin" and made accusations of the vilest kind against Rony.²⁵ There was uncontroverted testimony that as a direct result of the receipt of such letter by KCOP, Rony's television program was cancelled [T. p. 738, line 8; p. 739, line 12]. On the basis of this letter, Rony filed a counterclaim for libel against Axelbank [C. T. A. p. 41]. The trial court found the letter to be libelous *per se* and to have been maliciously motivated, and accordingly, rendered judgment in favor of Rony on his counterclaim.

A. Appellant's Letter to Heintz Constituted Libel Per Se.

Civil Code, Sections 45, 45a;

Bates v. Campbell, 213 Cal. 438, 2 P. 2d 838 (1931);

Jimeno v. Home Builders, 47 Cal. App. 660, 191 Pac. 64 (1920).²⁶

"Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed rep-

²⁵The letter in question is set out *in haec verba* in our Statement of the Case, *supra*.

²⁶See also *Draper v. Hellman Commercial Trust and Savings Bank*, 203 Cal. 26, 263 Pac. 240 (1928); *Williams v. Seiglitz*, 186 Cal. 767, 200 Pac. 635 (1921), *Corrigan v. Macloon*, 22 F. 2d 520 (C. C. A. 9, 1927).

resentation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.”

Civil Code, Sec. 45.

“ . . . The code definition of libel is very broad and has been held to include almost any language which, upon its face, has a natural tendency to injure a person’s reputation, either generally, or with respect to his occupation. . . .”

Bates v. Campbell, supra, 213 Cal. 438, 441.

Publications falling within the above statutory definition are libelous *per se*, thus obviating the necessity for an averment of special damage.

Bates v. Campbell, supra, 213 Cal. 438, 442.

In *Jimeno v. Home Builders, supra*, the court explains the applicable rule as follows (47 Cal. App. 663-664):²⁷

“ . . . If, on its face, the publication is of a character that usually, ordinarily, and naturally detracts from the reputation and standing of the plaintiff, and tends proximately and naturally to deprive him of the confidence and esteem of others, thus causing him to be shunned or avoided, it is libelous *per se*, and special damages need not be alleged or proved. From such a publication the law presumes

²⁷“To be libelous *per se* the writing need not charge or impute a crime. . . .”

Dethlefsen v. Stull, 86 Cal. App. 2d 499, 502, 195 P. 2d 56 (1948).

See also:

Stevens v. Snow, 191 Cal. 58, 214 Pac. 968 (1923).

general damages as a natural and probably consequence.”²⁸

It is clear that appellant’s letter to Heintz constitutes libel *per se*.

Thus, on its face the letter necessarily suggests that Rony was untruthful, that he received stolen property, that Rony intentionally misappropriated literary property, that Rony disobeyed the laws of the United States and that Rony is sympathetic to Czarist and Stalinist laws. No innocent or harmless interpretation could possibly be given to such a letter. The letter is a direct attack upon Rony’s good name and character and could have no other effect *but* to injure him in his occupation and expose him to hatred, contempt, ridicule and obloquy. The evidence demonstrates this was exactly what happened.

Moreover, considering Axelbank’s letter as a whole, the tone of the entire letter, apart from any individual words or sentences, is defamatory. This is not a letter written to assert a right or a claim. It is a false diatribe and no other meaning can be drawn from it except that intended by the author—that Rony is an evil person and a criminal.

²⁸*Babcock v. McClatchy Newspapers*, 82 Cal. App. 2d 528, 186 P. 2d 737 (1947), cited by appellant, does not suggest a contrary rule. The *Babcock* case involved the publication of a statement by a citizen regarding the qualifications of certain political candidates, in which he raised a question as to the source of certain funds obtained by one of the candidates. The facts upon which the question was premised were not denied and there was no clear-cut charge of dishonesty or corruption. The same can hardly be said for appellant’s letter with respect to respondent Rony in the instant case.

B. The Heintz Letter Was Not Privileged.

Preliminary Statement.

The only possible basis for any privilege which might be asserted in the instant case is found in *Civil Code*, Section 47(3).²⁹

Even assuming, *arguendo*, that that provision might have justified a proper letter by appellant, it is clear that

²⁹*Civil Code*, Section 47 provides:

"A privileged publication or broadcast is one made—

"1. In the proper discharge of an official duty.

"2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under Section 137 of this code made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication or broadcast as to the person making said allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action.

"3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.

"4. By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued.

"5. By a fair and true report of (1) the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit."

It is clear that none of the foregoing provisions, aside from Section 3, could have any possible application to the instant case.

the letter as written exceeds the bounds of any possible privilege:

First, because it contains irrelevant matters which are not within the scope of the privilege.

Secondly, because it was actuated by malice which destroys the qualified privilege set forth in Section 47(3).

1. *The Letter Contains Irrelevant Matter Which Is Not Within the Scope of the Privilege Accorded by Section 47(3).*
-

Appellant's letter certainly exceeds any privilege which might have attached to it. Had he simply asserted his claim that he, Axelbank, was the proprietor of the property exhibited by KCOP and Rony, and had he then simply demanded withdrawal of the program or damages, concededly there might have been a privileged communication. But he went far beyond the necessary language to communicate such a claim.

It is therefore clear that appellant has exceeded any possible privilege he may have had under the circumstances.

See:

Corrigan v. Macloon, supra, 22 F. 2d 520 (C. C. A. 9, 1927).

2. *The Qualified Privilege Set Forth in Section 47(3) Is Not Available to Appellant in Light of the Fact That His Letter Was Actuated by Malice Toward Respondent Rony.*
-

In order that the privilege accorded by *Civil Code*, Section 47(3) be available, it must appear that the publication was made without malice.

B. The Heintz Letter Was Not Privileged.

Preliminary Statement.

The only possible basis for any privilege which might be asserted in the instant case is found in *Civil Code*, Section 47(3).²⁹

Even assuming, *arguendo*, that that provision might have justified a proper letter by appellant, it is clear that

²⁹*Civil Code*, Section 47 provides:

“A privileged publication or broadcast is one made—

“1. In the proper discharge of an official duty.

“2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under Section 137 of this code made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication or broadcast as to the person making said allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action.

“3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.

“4. By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued.

“5. By a fair and true report of (1) the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.”

It is clear that none of the foregoing provisions, aside from Section 3, could have any possible application to the instant case.

the letter as written exceeds the bounds of any possible privilege:

First, because it contains irrelevant matters which are not within the scope of the privilege.

Secondly, because it was actuated by malice which destroys the qualified privilege set forth in Section 47(3).

1. *The Letter Contains Irrelevant Matter Which Is Not Within the Scope of the Privilege Accorded by Section 47(3).*
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Appellant's letter certainly exceeds any privilege which might have attached to it. Had he simply asserted his claim that he, Axelbank, was the proprietor of the property exhibited by KCOP and Rony, and had he then simply demanded withdrawal of the program or damages, concededly there might have been a privileged communication. But he went far beyond the necessary language to communicate such a claim.

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2. *The Qualified Privilege Set Forth in Section 47(3) Is Not Available to Appellant in Light of the Fact That His Letter Was Actuated by Malice Toward Respondent Rony.*
-

In order that the privilege accorded by *Civil Code*, Section 47(3) be available, it must appear that the publication was made without malice.

Morcom v. San Francisco Shopping News, 4 Cal. App. 2d 284, 40 P. 2d 940 (1935);
Civil Code, Section 47(3).

See also:

Farr v. Bramblett, 132 Cal. App. 2d 36, 281 P. 2d 372 (1955).

Thus, in *Morcom v. San Francisco Shopping News*, *supra*, the court states the rule as follows (4 Cal. App. 2d 288, 289):

“ . . . in order that the privilege accorded by subdivision 3 of section 47 of the Civil Code, be available, it must appear that the publication was made without malice. If it be made to appear that the defendant acted with malicious intent, in uttering the libel, it cannot successfully invoke the protection of this privilege.

. . .

“The absence of malice is an essential element of the privilege; and in the presence of malice, the privilege does not exist. The law does not accord to anyone the privilege of publishing maliciously a false and defamatory statement concerning another.”

The tenor of the defamatory statement itself may be sufficient to establish the existence of malice.

Brewer v. Second Baptist Church, 32 Cal. 2d 791, 197 P. 2d 713 (1948);

Siemon v. Finkle, 190 Cal. 611, 213 Pac. 954 (1923);

Snively v. Record Publishing Co., 185 Cal. 565, 198 Pac. 1 (1921).

See, also:

Preston v. Frey, 91 Cal. 107, 27 Pac. 533 (1891).

Thus, in the leading case of *Snively v. Record Publishing Co.*, *supra*, the court states (185 Cal. 578):

“On the subject of actual malice it is important to note further that while one may, on a privileged occasion and without malice, publish to the interested persons what may be false, if he honestly believes it to be true, he is not by this rule given a license to overdraw, exaggerate, or to color the facts in his communication. The manner of statement is material upon the question of malice, and if the facts believed to be true are exaggerated, overdrawn, or colored to the detriment of plaintiff, or are not stated fully and fairly with respect to the plaintiff, the court or jury may properly consider these circumstances as evidence tending to prove actual malice, and they may be sufficient for that purpose without other evidence on the subject.”

Again, in *Siemon v. Finkle*, *supra*, the court declares (190 Cal. 618):

“ . . . Malice in fact may be proved either directly or indirectly—either by direct evidence of the evil motive or by legitimate inferences to be drawn from other facts and surrounding circumstances. And for the purpose of ascertaining the existence or nonexistence of actual malice there may be taken into consideration not only the general course of defendant’s conduct toward plaintiff and any specific act or acts tending to prove or disprove the existence of an evil motive, but also the internal

evidence furnished by the nature of the libel itself. (Davis v. Hearst, *supra*.)

“The general tone of the letter, the language employed therein to characterize plaintiff and plaintiff’s conduct, considered in the light of defendant’s motive for resentment therein disclosed, together with the fact that defendant Finkle unsolicited volunteered the first offer to furnish information about the plaintiff, warrant and support the inference that defendant Finkle was actuated in the publication of the false and defamatory statements by enmity and ill will.”³⁰

Measured by the foregoing rules, it is clear that malice was amply established in the instant case.

First of all, the nature of the publication itself is clear evidence that appellant was maliciously motivated.

Moreover, malice is evidenced by Axelbank’s conduct in his interview with respondent Rony, in which Axelbank not only reiterated the defamatory matter but went so far as to threaten harm to Rony’s children [T. p. 807, line 8, to p. 809, line 22].

Finally, malice can be inferred from the fact that Axelbank harbored a grudge against Rony since the time when Rony was called as an expert witness by a defendant who was being sued by Axelbank [T. p. 798, line 10].

³⁰*Freeman v. Mills*, 97 Cal. App. 2d 161, 217 P. 2d 687 (1950), cited by appellant, is completely beside the point, as that case merely involves an agency report on its investigation of an employee under circumstances in which the communication was obviously privileged. In the *Freeman* case, *supra*, unlike the instant case, the report did not exceed the scope of the privilege and there was no evidence that it was maliciously motivated. That is hardly the situation with which we are confronted here.

CONCLUSION.

The trial court's findings, amply supported by the evidence, establish beyond question that appellant's claims of copyright infringement (and unfair competition) are utterly lacking in merit, and that appellee Rony is entitled to judgment on his counterclaim for libel. Accordingly, we respectfully submit that the judgment of the trial court should be affirmed in all respects.

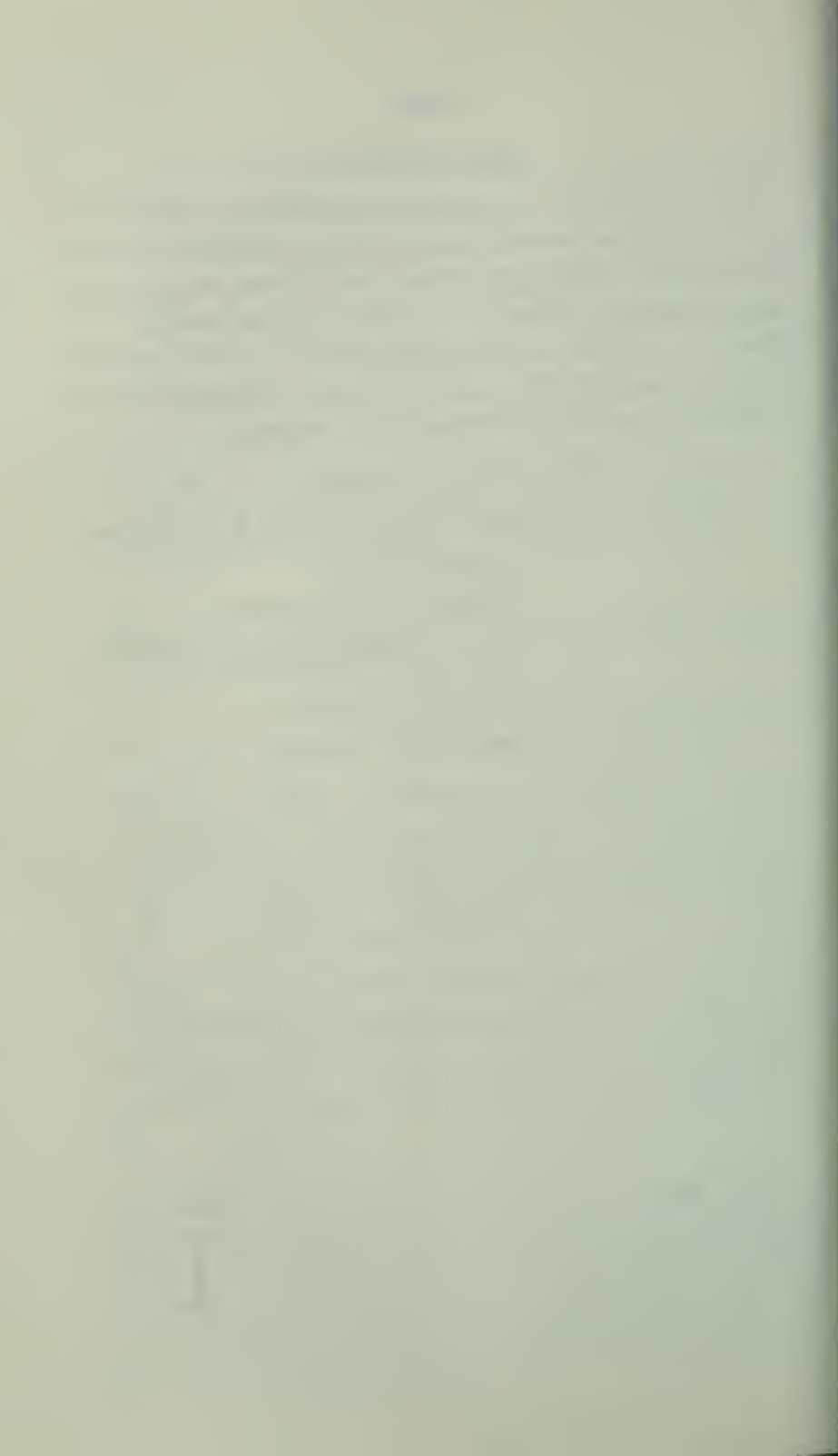
Respectfully submitted,

PACHT, ROSS, WARNE & BERNHARD,

JERRY PACHT,

HARVEY M. GROSSMAN,

Attorneys for Appellees.



No. 15926✓

United States
Court of Appeals
for the Ninth Circuit

ALFRED V. HAGEN,

Appellant,

vs.

CITY OF PALMER,

Appellee.

Transcript of Record

Appeal from the District Court for the
Territory of Alaska,
Third Division

FILED
JUN 20 1958
PAUL P. O'BRIEN, CLERK

No. 15926

**United States
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NAMES AND ADDRESSES OF ATTORNEYS

BOYKO, TALBOT & TULIN,

Turnagain Arms Bldg.,
Anchorage, Alaska ;

EDGAR PAUL BOYKO,

1155 Jones St.,
San Francisco, Calif.,

For the Appellant.

JOHN D. SHAW,

P. O. Box 1926,
Palmer, Alaska,

For the Appellee.

In the District Court for the District of Alaska,
Third Division

No. 3582—Cr.

Time: 3:10 P. M.

Nov. 21, '56

CITY OF PALMER

PROCEEDINGS IN THE MAGISTRATE
COURT

Defendant: Alfred V. Hagen

Complainant: Bernard R. Bouwens

Charge: Failure to file Sales Tax for month of
August, 1956. Plea of not guilty entered and
motion for continuance made.

Motion granted.

Trial set for December 4, 1956, 2:00 P.M.

I certify the above is a true and complete copy of
proceedings held in Magistrate Court, Palmer,
Alaska, November 21, 1956.

[Seal] /s/ L. C. STOCK,
City Magistrate.

Magistrate Court, City of Palmer

12-4-56.

Time: 2:00 P.M.

Defendant: Alfred V. Hagen

Complainant: Bernard R. Bouwens

Complaint: Failure to file Sales Tax Returns for August, 1956.

Mr. Hagen represented by Attorney Boyko.

Motion made to quash: Denied.

Motion to disqualify Magistrate: Denied.

Mr. Shaw, City Attorney, called Mr. Bouwens and Louise Loberg to identify.

City Records presented in evidence.

Mr. Boyko, called Mr. Hagen who stated he had filed & paid sales tax for Aug.

Under cross-examination by Mr. Shaw, Mr. Hagen stated he had paid on Nov. 15.

Verdict: Guilty.

Sentence: \$50.00 Fine.

Oral Notice of Appeal given.

Appeal Bond set at \$100.00.

I certify the above is a true and complete copy of proceedings held in Magistrate Court, Palmer, Alaska, December 4, 1956.

[Seal] /s/ L. C. STOCK,
City Magistrate.

In the Municipal Magistrate's Court for the
City of Palmer, Territory of Alaska

No. 111

CITY OF PALMER,

vs.

ALFRED HAGEN.

WARRANT OF ARREST

The City of Palmer, Alaska

To the Chief of Police of the City of Palmer, Alaska
or to Any Police Officer of the Said City,
Greetings:

You Are Hereby Commanded to forthwith arrest and take into your custody Alfred Hagen, the above-named defendant, a complaint having been filed in the above-entitled court and cause charging the said defendant with the crime of Failure to file sales tax return for the month of August, 1956, in violation of Section 6, Chapter 40, Palmer General Code as is more particularly set forth in said complaint, and bring him, the said Alfred Hagen before me to answer the said complaint, and to be further dealt with according to law.

Hereof Fail Not, and make return of this writ with your doing endorsed thereon.

Given under my hand and seal, at Palmer, Alaska,
this 15th day of November, 1956.

/s/ L. C. STOCK,

Municipal Magistrate of the
City of Palmer, Alaska.

In the Municipal Court, City of Palmer,
Territory of Alaska

No. 137

THE CITY OF PALMER, a Municipal Corporation,

Plaintiff,

vs.

ALFRED V. HAGEN, d/b/a VALLEY THEATRE,

Defendant.

COMPLAINT

For Violation of Ordinance No. 40

Alfred V. Hagen is accused by Bernard R. Bouwens in this Complaint of a misdemeanor, that of failure to file sales tax returns committed as follows to wit:

The said Alfred V. Hagen, d/b/a Valley Theatre in the City of Palmer, Alaska and within the jurisdiction of this Court, did, wilfully

Fail to file a sales tax return for retail sales and service made and performed during the month of August, 1956, in violation of Section No. 6, Ordinance No. 40, and contrary to said Ordinance of the said City of Palmer, in such case made and provided, and against the peace and dignity of the People.

/s/ BERNARD R. BOUWENS,
(Complainant.)

Territory of Alaska,
City of Palmer—ss.

I, s/s Bernard R. Bouwens being first duly sworn,
depose and say, that I have made complaint as afore-
said, and that said complaint is true.

/s/ BERNARD R. BOUWENS,
(Complainant.)

Subscribed and sworn to before me this 15th day
of November, 1956.

/s/ L. C. STOCK,
Municipal Magistrate.

Bail Set

\$100.00 L.C.S. s/s

Received December 29, 1956.

[Endorsed]: Filed December 31, 1956.

In the Municipal Magistrate's Court for the
City of Palmer, Territory of Alaska

No. 111

CITY OF PALMER,

Plaintiff,

vs.

ALFRED HAGEN,

Defendant.

PLEA AND MOTION FOR CONTINUANCE

The defendant herein enters his plea of "Not
Guilty" and moves for a continuance of the date of

trial on the ground that his attorney is and will be engaged in the trial of other cases until on or after December 3, 1956.

/s/ ALFRED V. HAGEN.

Motion Granted. Date of Trial set for December 4, 1956.

/s/ L. C. STOCK.

[Title of Cause.]

MOTION TO DISQUALIFY MAGISTRATE

The defendant above named, by Edgar Paul Boyko, his attorney, respectfully moves that the Municipal Magistrate herein, Mr. L. C. Stock, disqualify himself for the following reasons:

1. This is a case involving an alleged violation of Palmer Ordinance No. 40, the sales tax ordinance.
2. The alleged violation has to do with the collection of such tax.
3. The said L. C. Stock is also the City Clerk of the City of Palmer who is charged with the responsibility for making sales tax collections.
4. It would be improper for the person responsible for and interested in the collection of such tax to attempt to sit in impartial judgment over a person alleged to have violated the rules pertaining to such collection.

/s/ EDGAR PAUL BOYKO,
Attorney for Defendant.

Motion Denied.

/s/ L. C. STOCK.

In the Municipal Court, City of Palmer,
Territory of Alaska

No. 111

THE CITY OF PALMER, a Municipal Corpora-
tion,

Plaintiff,

vs.

A. V. HAGEN, d/b/a VALLEY THEATRE,

Defendant.

CITY OF PALMER,

Plaintiff,

vs.

ALFRED HAGEN,

Defendant.

MOTION TO QUASH WARRANTS OF
ARREST AND DISMISS COMPLAINTS

The defendant above named by Edgar Paul Boyko, his attorney, moves to quash the warrants of arrest issued herein and to dismiss the complaints and each of them on the ground that Ordinance No. 40 of the City of Palmer is invalid as being without sanction of Territorial Law and therefore this Court lacks jurisdiction.

/s/ EDGAR PAUL BOYKO,

Attorney for Defendant.

Motion Denied.

/s/ L. C. STOCK.

Certificate of service attached.

[Title of District Court and Cause.]

No. 3582—Cr.

M. O. SETTING CAUSE FOR TRIAL

Before: The Honorable J. L. McCarrey, Jr.,
District Judge.

Now, at this time upon the Court's motion,

It Is Ordered that above cause be, and it is hereby,
set for trial at 10:00 o'clock a.m., Monday, October
21, 1957, to follow 3575—Cr.

Entered October 3, 1957.

[Title of District Court and Cause.]

No. 3582—Cr.

M. O. OF CONTINUANCE

Before: The Honorable J. L. McCarrey, Jr.,
District Judge.

Plaintiff represented by John Shaw; defendant
not present but represented by Charles Tulin of
counsel. Charles Tulin for and in behalf of defend-
ant moved Court that trial be continued for the rea-
son it was formerly his partner's case and he is un-
familiar with it and would like time to talk to his
client. John Shaw for and in behalf of the City of
Palmer concurs.

Motion granted and trial continued to 10:00 o'clock a.m. of Wednesday, October 23, 1957.

Entered October 21, 1957.

[Title of District Court and Cause.]

No. 3582—Cr.

TRIAL BY COURT

Before: The Honorable J. L. McCarrey, Jr.,
District Judge.

Now, at this time the above cause came on regularly for trial; City of Palmer represented by John Shaw; defendant present and represented by Charles Tulin, of counsel; the following proceedings were had, to wit:

Respective counsel stipulate as to certain facts orally and Court directs counsel to prepare and submit written stipulation accordingly.

After stipulation there remains only a question of law to be determined.

Charles Tulin for and in behalf of defendant moves the Court for a Judgment of Acquittal for the reason the sales tax is void.

Decision reserved.

Counsel for defendant is directed to file a brief within 10 days—counsel for plaintiff to file answer—

ing brief 10 days thereafter and counsel for defendant to file reply brief 5 days thereafter.

Entered October 23, 1957.

[Title of Cause.]

NOTATION ON DOCKET

Date Complaint Filed: November 15, 1956.

Date Arraigned: November 15, 1956.

Trial Date: November 21, 1956.

Sentence: Request granted to postpone trial until
December 4, 1956.

/s/ L. C. STOCK,
City Magistrate.

Notation on Docket

Date Complaint Filed: November 15, 1956.

Date Arranged: November 15, 1956.

Trial Date: December 4, 1956.

Sentence: \$50.00 Fine.

Witnesses Sworn: Bernard R. Bouwens, Louise
Loberg.

Defense Attorney: Edgar Paul Boyko.

Motions by Defense:

To Quash; Motion Denied.

To Disqualify City Magistrate; Motion Denied.

Appeal Bond: \$100.00.

I hereby certify that the above is a true and correct copy of the docket of November 21, 1957, and December 4, 1957, in the Case of City of Palmer vs. Alfred V. Hagen.

[Seal] /s/ L. C. STOCK,
City Magistrate.

[Endorsed]: Filed October 23, 1957.

In the District Court for the District of Alaska,
Third Division
No. 3582—Cr.

CITY OF PALMER.

Plaintiff,

VS.

ALFRED HAGEN,

Defendant.

MOTION FOR A JUDGMENT OF ACQUITTAL

Comes now the above-named Defendant, by and through his counsel Charles E. Tulin and moves this Honorable Court for a Judgment of Acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, on the grounds that the Palmer sales tax ordinance No. 10, as amended by sales tax ordinance No. 40, under which ordinance the Defendant has

been convicted, was passed without enabling legislation, and without sanction of law, and is therefore void.

Dated at Anchorage, Alaska, this 31st day of October, 1957.

/s/ CHARLES E. TULIN,
Attorney for Defendant.

Received and filed October 31, 1957.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties, in order to facilitate the hearing of the case, save time for the Court and avoid the calling of witnesses and presentation of evidence, as follows:

1. That Ordinances Nos. 10, 40 and 48 attached hereto and made a part hereof by reference are duly enacted and official ordinances of the City of Palmer.
2. That the defendant collected sales tax from the public, in the usual course of his business, during the month of August, 1956, in accordance with the requirements of Ordinance No. 40.
3. That the defendant failed to make timely filing of his sales tax return as charged in the complaint.
4. That the defendant was arrested, released on his own recognizance, tried before the City Magistrate of the City of Palmer on December 4, 1956;

found guilty; sentenced to pay a fine of \$50; filed timely notice of appeal and posted his undertaking for bail on appeal in the amount of \$100.00.

5. That the defendant has heretofore filed said return and surrendered said tax monies for the said month of August, 1946.

6. That the defendant was a member of the City Council of the City of Palmer at the times Ordinances Nos. 10 and 40 were enacted; that he supported and voted for the enactments of the same; that he served as mayor of said City from October of 1952, until October of 1953; that by virtue of such offices he was charged with the duty of enforcing said ordinances during his term thereof, and that he was a member of the City Council of said City in August and September of 1956, at the times alleged in the complaint herein.

7. That the defendant was previously and on February 16, 1955, convicted of his first offense upon like facts under said Ordinance No. 40, but that this fact (No. 7) is not submitted for use of the Court in determining the guilt or innocence of the defendant in this case, but only for the purpose of passing sentence in the event the Court should find the defendant guilty.

Dated at Anchorage, Alaska, this 5th day of November, 1957.

BOYKO, TALBOT AND TULIN,

By /s/ CHARLES E. TULIN,

Attorneys for the Defendant.

JOHN D. SHAW,
City Attorney for the
City of Palmer;

WILLIAM T. PLUMMER,
United States Attorney,
Third Division;

By /s/ JOHN D. SHAW,
Attorneys for the Plaintiff.

Ordinance No. 40

An Ordinance to Provide for the Levying and Collection of a Consumer Two (2) Per Centum Sales Tax on Retail Sales and Services Made Within the City of Palmer, Alaska. The Proceeds to Be Used for General Purposes Relating to Services, Health and Welfare of the City and in Administration of the City Government: Providing for Administering, and Method of Collecting Said Tax: Providing Penalties: Fixing the Date When Such Ordinance and Tax Shall Become Effective, and Repealing Ordinance No. 10.

Whereas, more than fifty-five (55) per centum of the qualified voters voting at a special election held July 10, 1951, have consented to the levying and collection of a consumer's sales and service tax not to exceed two (2%) per centum of the sales prices on all retail sales and services made within the City of Palmer, Alaska, pursuant to Section 16-1-35,

ACLA 1949, as amended by House Bill No. 65 of the 19th session of the Legislature of the Territory of Alaska.

Now Therefore Be It Ordained by the Common Council of the City of Palmer, Alaska:

Section 1. "Retail Sale" shall be construed to mean the transfer of title to tangible personal property for consumption or use, and not for resale in substantially the same form or condition. A sale made to a purchaser for his own use, or to be consumed by him in fabricating an article for subsequent sale to another shall be deemed a retail sale.

"Services" shall be construed to mean the rendering of any personal service, professional and otherwise, to or for another's use or benefit, for money or other valuable consideration save and excepting remuneration for services shall not be construed to mean salaries and wages received by an employee.

"Consumer" shall be construed to mean the person who receives the use or benefit of personal property purchased or services rendered.

The term "selling price" shall be construed to mean the overall consideration, whether money, credit, right or other property expressed in the terms of money, paid or delivered by a buyer to a seller, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expenses whatsoever paid or accrued, and without any deduction on account of losses.

The term "seller" shall be construed to mean every person, firm or corporation making sales at retail to a buyer or consumer, whether as agent, broker or principal; and the term shall include performing services for remuneration.

The term "wholesale sale" shall be construed to mean the sale of goods or articles to another for resale in the same form purchased.

"Sales of articles to contractors and sub-contractors," for use in the performance of labor or services for another shall not be deemed a sale to a consumer. In such cases the prime contractor shall collect the tax from the consumer or person receiving the benefit of the prime contractor's labor or services, which tax shall be based upon the price charged for the prime contractor's overall services, including the cost of labor and materials furnished by the prime contractor's sub-contractors.

"Mail order sales and sales made by personal solicitation." Sales to consumers made by mail-order houses or other sellers having a place of business within the municipality or having a place of business elsewhere, but who solicit sales with the municipality, are taxable, if the order is accepted with the municipality, and delivery is made by the seller at such place of business or elsewhere within the municipality.

Section 2. From and after the first day of January, 1954, there shall be levied and collected a tax on retail sales and services made within the city of

Palmer equal to two (2%) per centum of the selling price and/or charge made for the services rendered, when such selling price and/or charge made amounts to twenty-five (25) cents or more.

Section 3. The tax levied hereunder shall apply to the following sales and services:

- (a) All tangible personal property.
- (b) Natural or artificial gas, electricity, ice, steam, water, or any public service or public utility.
- (c) Transportation for hire of persons by common carrier, including motor transportation, taxicab companies and all other means of transportation for hire.
- (d) Service by telephone companies to subscribers or users, including transmission of messages, whether local or long distance. This shall include all services and rental charges having any connection with telephone service, but not include deposits.
- (e) Printing or printed matter of all types, kinds and characters and the service of printing or over printing.
- (f) The service of renting rooms or living quarters or offices or other commercial space of whatever name or nature by hotels, apartments, rooming houses, public lodging houses or by firms or individuals rent single or multiple unit residences or offices or other commercial space.
- (g) Foods, confections and all drinks sold and dispensed by hotels, restaurants, or other dispensers

and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere.

(h) Advertising of all kinds, types and character contracted for or sold in Palmer, including any and all devices used for advertising purposes and the servicing of advertising devices.

(i) Gross proceeds derived from the operation of punch boards, slot machines, marble machines, juke boxes, merchandise vending machines or amusement devices of any kind.

(j) The sale of tickets or admissions to places of amusement, entertainment, recreational or athletic events, or dues or fees for the privilege of having access to or the use of amusement, entertainment, athletic or recreational facilities, including free or complimentary passes and tickets, dues or fees are hereby declared to have a value equivalent to the sale price or value of said tickets, passes, admissions, fees or dues.

(k) For the purpose of this Ordinance, sales and services of tangible personal property made for the purpose of developing and improving real estate, even though such real estate is intended for resale as real property, are hereby declared to be sales to consumers or users. Sales and/or services of tangible personal property, including materials, supplies and equipment made to contractors who use same in the performance of any contract, are hereby declared not to be sales to consumers or users. Sales of tangible

personal property to persons who are primarily engaged in selling their services shall be deemed sales to consumers or users and therefore taxable.

(1) Services of dry cleaners, laundries, garages, barber and beauty shops, cold storage and locker plants.

(m) Other service falling within the meaning as defined in Section 1, and not specifically excluded by Section 4.

(n) Retail sales of motor fuels.

Section 4. The tax hereby levied shall not apply to the following:

(a) Casual and isolated sales not exceeding fifty (\$50.00) dollars and not made in the regular course of business.

(b) Sales of insurance and bonds of guaranty and fidelity.

(c) Gross receipts or proceeds derived from funeral charges and services, medical or dental services rendered, and hospital services.

(d) Gross receipts or gross proceeds derived from the transportation of students to and from grade or high schools in motor or other vehicles.

(e) Gross receipts or gross proceeds derived from the sale of tangible personal property or services by churches, except where such organizations are engaged in business for profit or savings, or com-

peting with other persons engaged in the same or similar business.

(f) Gross receipts or proceeds derived from the sale of food in public, common, high school or college cafeterias or lunch rooms operated primarily for the public and not operated for profit.

(g) Gross receipts or proceeds derived from carrier sales made directly to consumers or users of newspapers or any other periodicals.

(h) Gross receipts or proceeds derived from sales or services which the municipality is prohibited from taxing under the laws of the Territory of Alaska, or under the laws of the United States; or gross receipts or proceeds from the transportation, loading, unloading or storing of cargo from vessels or aircraft in foreign or interstate commerce, or on goods in transit or awaiting and being processed for shipment.

(i) Gross receipts or proceeds derived from sales to the United States Government, Territory of Alaska, any political subdivision thereof, or the City of Palmer, Alaska.

(j) Dues or fees to clubs, labor unions or fraternal organizations.

(k) Real estate agent's gross receipts received on behalf of owner and derived from sale of real property, but excepting the real estate agent's fee earned as commission for sale of such property, which fee or commission shall be taxable.

(l) Sales of tickets for school entertainments, school athletic events, and activities conducted for eleemosynary purposes or community benefits.

(m) Bulk sales of feed, seed and fertilizer to farmers.

(n) Interstate air, train and boat fares.

(o) Receipts from the filling of Doctor's prescriptions by licensed pharmaceulics.

(p) Sales of drugs and medicines for use in hospitals and clinics.

(q) Sales of food supplies to cafes, restaurants and other establishment where food is sold to the public for use in the normal course of business of cafes and restaurants and such other establishments.

(r) Sales of food supplies to hospitals, to children's homes having 6 or more charges, recreational camps and schools shall be exempt provided a certificate authorizing such exemption is first obtained from the City.

Section 5. The maximum tax on contract construction of buildings or residences on any single piece of machinery or equipment such as a car, or a boat or an engine shall be ten (\$10.00) dollars; and, even though the single sale of one article may run to several thousands of dollars, only the first five hundred (\$500.00) dollars shall be subject to tax under the terms and provisions of this Ordinance. It is specifically proved, however, that sales of supplies, ice, or oil or gas, or equipment, individually or in

the aggregate, shall not be construed as falling in the exempted class, nor shall the total sales price of any combination of items of merchandise, machinery, equipment or goods, wares or merchandise, be considered as a single sale for the purpose of securing the exemption provided for by this Section.

And for the purpose of facilitating the collection of the tax and for the convenience of the consumer, the following special application of this regulation shall prevail:

(a) The consumer who proposes to construct a building or buildings within the City of Palmer may, at the time of making application for and receiving the building permit, pay the maximum tax required under this Ordinance; and the subsequent showing of the tax receipt then issued shall exempt said consumer for a period not to exceed one year, from paying any further tax in purchasing for the project for which the permit has been issued; showing of such receipt, which shall not be transferable, at the time of the purchase of goods, materials or articles will be sufficient to permit the purchase of the goods, materials or articles without further payment of tax and will relieve the merchant or seller from the obligation to collect the tax, as in Section 7 provided.

(b) In the event that the building or buildings for the project is to be erected outside of the City of Palmer, the consumer may pay the tax to the City Clerk and receive a receipt which shall be considered by the merchant or seller as *prima facie*

evidence of the previous payment of such tax for any purchase for the particular project described on the tax receipt; showing of such receipt at the time of the purchase of goods, materials or articles without further payment of tax and will relieve the merchant or seller from the obligation to collect the tax, as in Section 7 provided.

(c) In the event that any other single project, other than those buildings or construction for which a building permit would be required, is contemplated, requiring miscellaneous purchasing from more than one seller, the consumer may, in order to avoid the payment of multiple taxes, obtain from the city clerk a receipt showing the maximum payment of the tax and the description of the project; the showing of such receipt at the time of the purchase of goods, materials or articles will be sufficient to permit the purchase of the goods, materials or articles without further payment of the tax and will relieve the merchant or seller from the obligation to collect the tax, as in Section 7 provided.

Section 6. Every seller making the retail sales and every person performing services, on or before the tenth (10th) day of each month shall make out a return for the preceding month upon forms to be provided by the City Clerk, setting forth the amount of all sales and services, all non-taxable sales and services, and all taxable sales and services for the preceding month, the amount of the tax thereon, and such other information as the city clerk may require, and sign and transmit the same to the City Clerk.

The tax levied under this Ordinance, whether or not collected from the buyer, shall be paid by the seller and/or person performing services, to the city clerk in monthly installments at the time of transmitting the return and, if not so paid, such tax shall forthwith become delinquent. In the event the tax is not paid before delinquency, as herein provided a penalty of five (5%) per centum of such tax shall be added to the tax for the first month or fraction thereof of delinquency, and an additional five (5%) per centum for each additional month or fraction thereof of delinquency until a total penalty of fifteen (15%) per centum has accrued. Such penalty shall be assessed and collected in the same manner as the tax is assessed and collected. In addition to the aforesaid penalty, interest at the rate of six (6%) per centum per annum on the delinquent tax from the date of delinquency until paid shall accrue and be collected in the same manner the delinquent tax is collected.

Such returns shall show such further information as the city clerk may require to enable him to compute correctly and collect the tax herein levied. In addition to the information required on returns, the city clerk may request and the taxpayer must furnish any information deemed necessary for a correct computation of the tax. Such taxpayer shall compute and remit to the city clerk the required tax due for the preceding months and the remittance or remittances of the tax must accompany the returns herein required. If not paid on or before the last day of each month, the tax shall be delinquent from such

date, and collection shall be enforced under the terms of this Ordinance as set forth in Sections 7 & 9.

It shall be the duty of every taxpayer required to make a return and pay any tax under this Ordinance, to keep and preserve suitable records of the gross daily sales together with invoices of purchases and sales, bills of lading, bills of sale and other pertinent records and documents which may be necessary to determine the amount of tax due hereunder and such other records of goods, wares, merchandise and other subjects of taxation under this Ordinance as will substantiate and prove the accuracy of such returns. It shall also be the duty of every person who makes sales for resale to keep records of such sales which shall be subject to examination by the city clerk or any authorized employee thereof while engaged in checking or auditing the records of any taxpayer required to make a report under the terms of this Ordinance.

All such records shall remain in the City of Palmer and be preserved for a period of three years (3), unless the city clerk in writing has authorized their destruction or disposal at an earlier date, and shall be open to examination at any time by the city clerk or any authorized employee thereof while engaged in checking such records. The burden of proving that a sale was not a taxable sale shall be upon the person making the sale.

Section 7. The tax levied hereunder shall be paid by the consumer or user of the seller, and it shall be the duty of each and every seller of the City of

Palmer to collect from the consumer or user, the full amount of the tax imposed by this Ordinance, except that the tax on receipts or proceeds from the various mechanical devices as stipulated in Paragraph (i), Section 3, shall be paid by the owner and/or operator thereof.

Sellers shall add the tax imposed under this Ordinance or the average equivalent thereof, to the sales price or charge, and when so added such tax shall constitute a part of such price or charge and shall be a debt from the consumer or user to the vendor until paid, and shall be recoverable at law in the same manner as other debts. Performers and/or sellers of services shall be considered sellers of the purpose of this Section.

Sellers shall add this tax to the sale price or service charge in strict accordance with the following scale.

Charge	Tax
Under 25c	none
25c thru 64c.....	.01
65c thru 1.24.....	.02
1.25 thru 1.64.....	.03
1.65 thru 2.24.....	.04
2.25 thru 2.64.....	.05
2.65 thru 3.24.....	.06
3.25 thru 3.64.....	.07
3.65 thru 4.24.....	.08
4.25 thru 4.64.....	.09
4.65 thru 5.24.....	.10

Over \$5.24 continue on same scale.

Section 8. All monies accumulated under the terms of this Ordinance shall be deposited by the city clerk with the Palmer Bank or such other bank as the Common Council of the City of Palmer, Alaska shall determine in an account title General Purpose Fund, City of Palmer and no part of these funds may be diverted to any use other than herein stipulated. Expenditures from these funds may be made at the discretion and only by the order of the Common Council for the uses stipulated.

Section 9. A seller who wilfully or intentionally fails, neglects or refuses to collect the full amount of the tax imposed by this Ordinance, or wilfully or intentionally fails, neglects or refuses to comply with the provisions of this Ordinance, or permits or rebates to a consumer or user, either directly or indirectly and by whatsoever means, all or any part of the tax levied by this Ordinance, or makes in any form of advertising, verbally or otherwise, any statement which infers that he is absorbing the tax, or paying the tax for the consumer or user by an adjustment of prices or at a price including the tax, or in any manner whatsoever, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than twenty-five (25.00) dollars, and upon conviction for a second or other subsequent offense, shall be fined not more than one hundred (\$100.00) dollars, or imprisoned in the City Jail for not more than thirty (30) days, or both such fine and imprisonment.

Any person, firm, copartnership or corporation violating any of the provisions of this ordinance

shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five (25) dollars or more than one hundred (100) dollars; and upon conviction of a second or subsequent offense shall be fined not more than one hundred (100) dollars or imprisoned in the City Jail not more than thirty (30) days or both such fine and imprisonment in the discretion of the City Magistrate, and shall pay the costs of prosecution.

Section 10. If any section, subsection, clause, sentence, or phrase of this Ordinance is held to be invalid, the decision shall not affect the validity or the meaning of the remaining portions of this Ordinance. The Common Council of the City declares that it would have passed this Ordinance and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

Section 11. Ordinance No. 10 is hereby repealed as of the time when this ordinance takes effect.

This Ordinance shall be in full force and effect and Ordinance No. 10 is repealed from and after 12:01 a.m. the 1st day of January, 1954.

First Reading: December 1, 1953.

Second Reading: December 15, 1953.

Third Reading: December 22, 1953.

Passed and approved this 22nd day of December,
1953.

/s/ DON McKECHNIE,
Mayor, City of Palmer.

Attest:

/s/ ELIZABETH BARRY,
City Clerk.

I hereby certify that this is a true and correct
copy of Ordinance No. 40.

[Seal] /s/ L. C. STOCK,
City Clerk.

City of Palmer, Alaska
Ordinance No. 48

An Ordinance Amending All Ordinances of the
City of Palmer From No. 1 to and Including
No. 47, Wherein Penalties Are Provided, to
Provide Penalties Where Now No Penalties
Are Provided and to Increase the Maximum
Fine From \$100.00 to \$300.00 Upon Convic-
tion for the Violation of Any City Ordinance
or Rule or Regulation Adopted or Issued Pur-
suant to Such Ordinance.

Be It Ordained by the City Council of the City
of Palmer, Alaska: That wherever in Ordinances
No. 1 through No. 47, inclusive, the City of Palmer,
Alaska, a maximum punishment by fine of \$100.00
is provided, the same is hereby amended to read
"\$300.00."

That wherever any rule or regulation adopted or issued pursuant to any ordinance of the City of Palmer provides for a maximum fine of \$100.00 for violation thereof, the same be and hereby is amended to read "\$300.00."

That wherever any ordinance of the City of Palmer or any rule or regulation adopted pursuant thereto declares an act or acts to be unlawful without providing a penalty, the maximum penalty for the violation of the same shall be a fine of \$300.00 and imprisonment in the City Jail not more than 30 days or both such fine and imprisonment.

All other provisions of ordinances of the City of Palmer, Nos. 1 through 47, or any amendments thereof providing penalties for violations thereof, except as herein amended, shall remain in full force and effect.

An emergency having been declared, and the rules governing the introduction and passage of ordinances having been suspended, this ordinance hereby is passed by the City Council of the City of Palmer, Alaska, this 1st day of June, 1954.

/s/ BETTY MEARS,
Acting Mayor.

Attest:

/s/ ELIZABETH BARRY,
City Clerk.

City of Palmer, Alaska

Ordinance No. 10

An Ordinance to Provide for the Levying and Collection of a Consumers Two (2) Per Centum Sales Tax on Retail Sales and Services Made Within the City of Palmer, Alaska. The Proceeds to Be Used for General Purposes Relating to Services, Health, and Welfare of the City and in Administration of the City Government, Providing for Administering, and Method of Collecting Said Tax; Providing Penalties; and Fixing the Date When Such Ordinance and Tax Shall Become Effective.

Whereas, more than fifty-five (55) per centum of the qualified voters voting at a special election held July 10, 1951, have consented to the levying and collection of a consumer's sales and service tax not to exceed two (2%) per centum of the sales prices on all retail sales and services made within the city of Palmer, Alaska, pursuant to Section 16-1-35, ACLA 1949 so amended by House Bill No. 65 of the 19th Session of the Legislature of the Territory of Alaska.

Now Therefore Be It Ordained by the Common Council of the City of Palmer, Alaska:

Section 1. "Retail Sale" shall be construed to mean the transfer of title to tangible personal property for consumption or use, and not for resale in substantially the same form or condition. A

sale made to a purchaser for his own use, or to be consumed by him in fabricating an article for subsequent sale to another shall be deemed a retail sale.

“Services” shall be construed to mean the rendering of any personal service, professional and otherwise, to or for another’s use or benefit, for money or other valuable consideration save and excepting remuneration for services shall not be construed to mean salaries and wages received by an employee.

“Consumer” shall be construed to mean the person who receives the use or benefit of personal property purchased or services rendered.

The term “selling price” shall be construed to mean the overall consideration, whether money, credit, rights, or other property expressed in the terms of money, paid or delivered by a buyer to a seller, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expenses whatsoever paid or accrued, and without any deduction on account of losses.

The term “seller” shall be construed to mean every person, firm or corporation making sales at retail to a buyer or consumer, whether an agent, broker or principal; and the term shall include persons performing services for remuneration.

The term "wholesale sale" shall be construed to mean the sale of goods or articles to another for resale in the same form purchased.

"Sales of articles to contractors and subcontractors," for use in the performance of labor or services for another shall not be deemed a sale to a consumer. In such cases the prime contractor shall collect the tax from the consumer or person receiving the benefit of the prime contractor's labor or services, which tax shall be based upon the price charged for the prime contractor's overall services, including the cost of labor and materials furnished by the prime contractor's subcontractors.

"Mail order sales." Sales to consumers made by mail order houses or other seller having a place of business within the municipality are taxable, if the order is accepted within the municipality, and delivery is made by the seller at such place of business or elsewhere within the municipality.

Section 2. From and after the first day of September, 1951, or at a later date to be set by the Common Council of the City, there shall be levied and collected a tax on retail sales and services made within the City of Palmer equal to two (2%) per centum of the selling price and/or charge made for the services rendered, when such selling price and/or charge made amounts to thirty-five cents or more.

Section 3. The tax levied hereunder shall apply to the following sales and services:

- (a) All tangible personal property.

(b) Natural or artificial gas, electricity, ice, steam, water, or any public service or public utility.

(c) Transportation for hire of persons by common carrier, including motor transportation, taxicab companies and all other means of transportation for hire.

(d) Service by telephone companies to subscribers or users, including transmission of messages, whether local or long distance. This shall include all services and rental charges having any connection with telephone service.

(e) Printing or printed matter of all types, kinds and characters and the service of printing or over printing.

(f) The service of renting rooms or living quarters or offices or other commercial space of whatever name or nature by hotels, apartments, rooming houses, public lodging houses or by firms or individuals renting single or multiple unit residences or offices or other commercial space.

(g) Foods, confections and all drinks sold and dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere.

(h) Advertising of all kinds, types and characters originating in Palmer or adjacent areas, including any and all devices used for advertising purposes and the servicing of advertising devices.

(i) Gross proceeds derived from the operation of punch boards, slot machines, marble machines, juke boxes, merchandise vending machines, or amusement devices of any kind.

(j) The sale of tickets or admissions to places of amusement, entertainment, recreational or athletic events, or dues or fees for the privilege of having access to or the use of amusement, entertainment, athletic or recreational facilities, including free or complimentary passes and tickets, admissions, dues or fees. Such fee or complimentary passes and tickets, dues or fees are hereby declared to have a value equivalent to the sale price or value of said tickets, passes, admissions, fees, or dues.

(k) For the purpose of this Ordinance, sales and services of tangible personal property made for the purpose of developing and improving real estate even though such real estate is intended for resale as real property, are hereby declared to be sales to consumers or users. Sales and/or services of tangible personal property, including materials, supplies and equipment made to contractors who use same in the performance of any contract, are hereby declared not to be sales to consumers or users. Sales of tangible personal property to persons who are primarily engaged in selling their services shall be deemed sales to consumers or users and therefore taxable.

(1) Services of dry cleaners, laundries, garages, barber and beauty shops, cold storage and locker plants.

(m) Other services falling within the meaning as defined in Section 1, and not specifically excluded by Section 4.

Section 4. The tax hereby levied shall not apply to the following:

(a) Retail sales and for remuneration for services amounting to less than \$50.00 in any calendar month.

(b) Casual and isolated sales not made in the regular course of business.

(c) Sales of insurance and bonds of guaranty and fidelity.

(d) Gross receipts or proceeds derived from funeral charges and services, medical or dental services rendered, and hospital services.

(e) Gross receipts or gross proceeds derived from the sale of tangible personal property or services by churches, except where such organizations are engaged in business for profit or savings, or competing with other persons engaged in the same or similar business.

(f) Gross receipts or proceeds derived from the transportation of students to and from grade or high schools in motor or other vehicles.

(g) Gross receipts or proceeds derived from the sale of food in public, common, high school or college cafeterias or lunch rooms operated primarily for teachers and pupils, and not operated primarily for the public and not operated for profit.

(h) Gross receipts or proceeds derived from carrier sales made directly to consumers or users of newspapers or any other periodicals.

(i) Gross receipts or proceeds derived from sales or services which the municipality is prohibited from taxing under the laws of the Territory of Alaska, or under the laws of the United States; or gross receipts or proceeds from the transportation, loading, unloading, or storing of cargo from vessels or aircraft in foreign or interstate commerce, or on goods in transit or awaiting and being processed for shipment.

(j) Gross receipts or proceeds derived from sales to the United States Government, Territory of Alaska, any political subdivision thereof, or the City of Palmer, Alaska.

(k) Dues or fees to clubs, labor unions, or fraternal organizations.

(l) Gross receipts derived from the sale of real property; excepting the gross receipts earned as commissions by agents shall be taxable.

(m) Sales of tickets for school entertainments, school athletic events, and activities conducted for eleemosynary purposes or community benefits.

(n) Bulk sales of feed, seed and fertilizer to farmers.

(o) Interstate air, train, and boat fares.

Section 5. The maximum tax on the sale of real estate, contract construction of buildings or resi-

dences or any single piece of machinery or equipment such as a car, a boat, or an engine, shall be ten (\$10.00) dollars; and, even though the single sale of one article may run to several thousands of dollars, only the first five hundred (\$500.00) dollars shall be subject to tax under the terms and provisions of this Ordinance. It is specifically provided, however, that sales of supplies, ice, or oil or gas, or equipment, individually or in the aggregate, shall not be construed as falling in the exempted class, nor shall the total sales price of any combination of items of merchandise, machinery, equipment, or goods, wares or merchandize, be considered as a single sale for the purpose of securing the exemption provided for by this Section.

Section 6. Every seller making the retail sales and every person performing services, on or before the tenth day of each month shall make out a return for the preceding month upon forms to be provided by the City Clerk, setting forth the amount of all sales and services, all nontaxable sales and services, and all taxable sales and services for the preceding month, the amount of the tax thereon, and such other information as the City Clerk may require, and sign and transmit the same to the City Clerk. The tax levied under this Ordinance, whether or not collected from the buyer, shall be paid by the seller and/or person performing services, to the City Clerk in monthly installments at the time of transmitting the return, and if not so paid such tax shall forthwith become de-

linquent. In the event the tax is not paid before delinquency as herein provided a penalty of five (5%) per centum of such tax shall be added to the tax for the first month or fraction thereof of delinquency, and an additional five (5%) per centum for each additional month or fraction thereof of delinquency until a total penalty of fifteen (15%) per centum has accrued. Such penalty shall be assessed and collected in the same manner as the tax is assessed and collected. In addition to the aforesaid penalty, interest at the rate of six (6%) per centum per annum on the delinquent tax from the date of delinquency until paid shall accrue and be collected in the same manner the delinquent tax is collected.

Such returns shall show such further information as the City Clerk may require to enable him to compute correctly and collect the tax herein levied. In addition to the information required on returns, the City Clerk may request and the taxpayer must furnish any information deemed necessary for a correct computation of the tax. Such taxpayer shall compute and remit to the City Clerk the required tax due for the preceding month and the remittance or remittances of the tax must accompany the returns herein required. If not paid on or before the last day of each month immediately following the close of each quarter the tax shall be delinquent from such date, and collection will be enforced under the terms of this Ordinance as set forth in Sections 7 and 9.

It shall be the duty of every taxpayer required to make a return and pay any tax under this Ordinance, to keep and preserve suitable records of the gross daily sales together with invoices of purchases and sales, bills of lading, bills of sale and other pertinent records and documents which may be necessary to determine the amount of tax due hereunder and such other records of goods, wares, merchandise and other subjects of taxation under this Ordinance as will substantiate and prove the accuracy of such returns. It shall also be the duty of every person who makes sales for resale to keep records of such sales which shall be subject to examination by the City Clerk or any authorized employee thereof while engaged in checking or auditing the records of any taxpayer required to make a report under the terms of this Ordinance.

All such records shall remain in the City of Palmer and be preserved for a period of three (3) years, unless the City Clerk in writing has authorized their destruction or disposal at an earlier date, and shall be open to examination at any time by the City Clerk or any authorized employee thereof while engaged in checking such records. The burden of proving that a sale was not a taxable sale shall be upon the persons making the sale.

Section 7. The tax levied hereunder shall be paid by the consumer or user to the seller, and it shall be the duty of each and every seller of the City of Palmer to collect from the consumer or user, the full amount of the tax imposed by this

Ordinance, except that the tax on receipts or proceeds from the various mechanical devices as stipulated in Paragraph (i), Section 3, shall be paid by the owner and/or operator thereof.

Sellers shall add the tax imposed under this Ordinance or the average equivalent thereof, to the sales price or charge, and when so added such tax shall constitute a part of such price or charge and shall be a debt from the consumer or user to the vendor until paid, and shall be recoverable at law in the same manner as other debts. Performers and/or sellers of services shall be considered sellers for the purpose of this Section.

Sellers shall add this tax to the sale price or service charge in strict accordance with the following scale:

Charge	Tax
Under \$.34	None
\$.35 through \$.64.....	\$.01
.65 through 1.34.....	.02
1.35 through 1.64.....	.03
1.65 through 2.34.....	.04
2.35 through 2.64.....	.05
2.65 through 3.34.....	.06
3.35 through 3.64.....	.07
3.65 through 4.34.....	.08
4.35 through 4.64.....	.09
Over \$5.34 continue on same scale.	

Section 8. All monies accumulated under the terms of this Ordinance shall be deposited by the

City Clerk with the Palmer Bank or such other bank as the Common Council of the City of Palmer, Alaska, shall determine in an account titled General Purpose Fund, City of Palmer and no part of these funds may be diverted to any use other than herein stipulated. Expenditures from these funds may be made at the discretion and only by the order of the Common Council for the uses stipulated.

Section 9. A seller who wilfully or intentionally fails, neglects or refuses to collect the full amount of the tax imposed by this Ordinance, or wilfully or intentionally fails, neglects or refuses to comply with the provisions of this Ordinance, or remits or rebates to a consumer or user, either directly or indirectly and by whatsoever means, all or any part of the tax levied by this Ordinance, or makes in any form of advertising, verbally or otherwise, any statement which infers that he is absorbing the tax, or paying the tax for the consumer or user by an adjustment of prices or at a price including the tax, or in any manner whatsoever, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than twenty-five (\$25.00) dollars, and upon conviction for a second or other subsequent offense, shall be fined not more than one hundred (\$100.00) dollars, or imprisoned in the City Jail for not more than thirty (30) days, or both such fine and imprisonment.

Any person, firm, co-partnership or corporation violating any of the provisions of this ordinance

shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five (\$25.00) dollars or more than one hundred (\$100.00) dollars; and upon conviction of a second or subsequent offense shall be fined not more than one hundred (\$100.00) dollars or imprisoned in the City Jail not more than thirty (30) days or both such fine and imprisonment in the discretion of the City Magistrate, and shall pay the costs of prosecution.

Section 19. If any section, subsection, clause, sentence, or phrase of this Ordinance is held to be invalid, the decision shall not affect the validity or the meaning of the remaining portions of this Ordinance. The Common Council of the City declares that it would have passed this Ordinance and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

This Ordinance shall be in full force and effect from and after the first day of September, 1951.

Passed and approved this 5th day of August, 1951.

CARL H. MEIER,

Mayor.

Attest:

WILLIAM HEAD,

City Clerk.

[Endorsed]: Filed November 5, 1951.

[Title of District Court and Cause.]

No. 3582—Cr.

HEARING ON MOTION FOR JUDGMENT OF ACQUITTAL

Before: The Honorable J. L. McCarrey, Jr., District Judge.

Now, at this time hearing on motion for Judgment of Acquittal in the above cause, came on regularly before the court, plaintiff represented by John Shaw, attorney for City of Palmer; defendant represented by Charles Tulin, of counsel. The following proceedings were had, to-wit:

Argument to the Court was had by Charles Tulin, for and in behalf of the defendant.

Argument to the Court was had by John Shaw, for and in behalf of the City of Palmer.

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Argument to the Court was had by John Shaw, for and in behalf of the City of Palmer.

Whereupon, the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, announced it would reserve its decision.

Entered: November 15, 1957.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Whereas, a hearing was held on the above-entitled matter on the 13th day of November, 1957, and

Whereas, some question arose as to whether or not the Defendant herein paid the taxes in issue under protest,

Comes now the above-named Defendant and being first duly sworn deposes and says:

1. That he has personal knowledge of the facts contained in this affidavit.

2. That when he paid the retail sales taxes herein he did so under verbal protest to the city clerk.

3. That this affidavit is submitted to clarify statements to this effect made by counsel for the Defendant at the time of the hearing on the 13th day of November, 1957.

/s/ ALFRED HAGEN.

Subscribed and Sworn to Before Me, this 22nd day of November, 1957.

[Seal] /s/ FERN E. TULIN,

Notary Public in and for
Alaska.

My commission expires 10/21/61.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 22, 1957.

[Title of District Court and Cause.]

MEMORANDUM OPINION

JOHN SHAW,
For Plaintiff.

EDGAR PAUL BOYKO,
For Defendant.

This is an appeal from the Municipal Court of the City of Palmer and is submitted upon the following stipulation.

“It is hereby stipulated and agreed by and between the parties, in order to facilitate the hearing of the case, save time for the Court and avoid the calling of witnesses and presentation of evidence, as follows:

“1. That Ordinances Nos. 10, 40 and 48 attached hereto and made a part hereof by reference are duly enacted and official ordinances of the City of Palmer.

“2. That the defendant collected sales tax from the public, in the usual course of his business, during the month of August, 1956, in accordance with the requirements of Ordinance No. 40.

“3. That the defendant failed to make timely filing of his sales tax return as charged in the complaint.

“4. That the defendant was arrested, released on his own recognizance, tried before the City Magistrate of the City of Palmer on December 4, 1956.

found guilty, sentenced to pay a fine of \$50, filed timely notice of appeal and posted his undertaking for bail on appeal in the amount of \$100.00.

“5. That the defendant has heretofore filed said return and surrendered said tax monies for the said month of August, 1956.

“6. That the defendant was a member of the City Council of the City of Palmer at the times Ordinances Nos. 10 and 40 were enacted, that he supported and voted for the enactments of the same, that he served as mayor of said City from October of 1952 until October of 1953, that by virtue of such offices he was charged with the duty of enforcing said ordinances during his term thereof, and that he was a member of the City Council of said City in August and September of 1956 at the times alleged in the complaint herein.

“7. That the defendant was previously and on February 16, 1955, convicted of his first offense upon like facts under said Ordinance No. 40, but that this fact (No. 7) is not submitted for use of the Court in determining the guilt or innocence of the defendant in this case, but only for the purpose of passing sentence in the event the Court should find the defendant guilty.

“Dated at Anchorage, Alaska, this 5th day of November, 1957.

“BOYKO, TALBOT AND
TULIN,

“By /s/ CHARLES E. TULIN,

“Attorneys for the Defendant.

“JOHN D. SHAW,

“City Attorney for the City
of Palmer;

“WILLIAM T. PLUMMER,

“United States Attorney,
Third Division;

“By /s/ JOHN D. SHAW,

“Attorneys for the
Plaintiff.”

The defendant has moved the court for a judgment of acquittal under the rules.

The sole issue to be determined by the court in this case is whether one who has collected taxes under a city ordinance authorized by territorial statute, can now refuse to pay said taxes to the taxing authority on the grounds that the law under which the taxes were collected was illegal or void.

I am of the opinion and hereby find that it is not necessary for the court to determine the validity of the original or amendatory statutes or the ordinances here in question, for the reason that the defendant collected said taxes in question and, therefore, now is precluded from challenging the constitutionality of such statutes. When the defendant collected the taxes he became the agent of the city of Palmer and as such is obligated to account to the city, as principal, for the amount thereof, and as a collector, he cannot now deny the right of his principal to receive such, on the ground

that the tax was illegally levied. This is a well established principle of the law. Mecham, *The Law of Agency*, Book IV, sec. 526 (1889); *Village of Olean v. King*, 22 N.E. 559 (1889). The same result is often justified on grounds of estoppel, *Collins v. Tillou*, 68 AM. Dec. 398 (1857), constructive trust or other equitable grounds, *Murdock v. Cincinnati*, 44 F. 726 (1891).

Motion for judgment of acquittal is hereby denied. Monday, January 6 at the hour of 4 p.m. is the time hereby set down for the imposition of sentence.

Dated at Anchorage, Alaska, this 31st day of December, 1957.

/s/ J. L. McCARREY, JR.,
U. S. District Judge.

[Endorsed]: Filed December 31, 1957.

[Title of District Court and Cause.]

M. O. PRONOUNCING SENTENCE

Before: The Honorable J. L. McCarrey, Jr.,
District Judge.

Now, came John Shaw, counsel for the City of Palmer, and also came William T. Plummer, United States Attorney, for and in behalf of the Government, came also the defendant, in person, and with Charles Tulin, of his counsel, and this being the time heretofore set for pronouncement of

sentence in the above cause, the following proceedings were had, to-wit:

Statement to the Court was had by John Shaw, for and in behalf of the plaintiff.

Statement to the Court was had by William T. Plummer, for and in behalf of the plaintiff.

Statement to the Court was had by Charles Tulin, for and in behalf of the defendant.

At this time Motion by Charles Tulin was renewed, for and in behalf of the defendant for a judgment of acquittal.

Statement to the Court was had by John Shaw, for and in behalf of the plaintiff.

Statement to the Court was had by William T. Plummer, for and in behalf of the plaintiff.

Motion Denied.

Statement to the Court was had by Alfred Hagen for and in his own behalf.

The Court now pronounces judgment of Thirty (30) days, Twenty-nine (29) days of said sentence to be suspended, said sentence to commence at 10:00 o'clock a.m. of Tuesday, January 7, 1958, in the Federal Jail at Anchorage, Alaska, and a fine of \$300.00, against said defendant and directs the Assistant United States Attorney or John Shaw, counsel for the City of Palmer, to prepare and submit written judgment and commitment in accordance with the oral judgment given herein, and defendant waives presence when formal judgment is entered.

Entered: January 6, 1958.

[Title of District Court and Cause.]

M O. SETTING AMOUNT OF
APPEAL BOND

Before: The Honorable J. L. McCarrey, Jr.,
District Judge.

Now at this time upon the motion of Charles
Tulin, for and in behalf of the defendant, and Wil-
liam T. Plummer, United States Attorney, con-
curring,

It Is Ordered that the amount of the appeal bond
in the above cause, be, and it is hereby, fixed in
the amount of \$1,000.00.

[Entered]: January 7, 1958.

In the District Court for the District of Alaska,
Third Division

Criminal No. 3582

CITY OF PALMER, a Municipal Corporation,
Plaintiff,

vs.

ALFRED V. HAGEN,
Defendant.

JUDGMENT

On the day of December, 1957, came the at-
torney for the City of Palmer, John D. Shaw, and
the defendant appeared personally and through his

attorney, Charles E. Tulin, and entered a plea of not guilty to the offense as charged;

Whereupon, counsel stipulating to the facts of the case, and no witnesses being called, and the court being fully advised in the premises and having heard the arguments of counsel on behalf of both parties, and having considered respective briefs and thereafter having denied the motion of the defendant for judgment of acquittal and the subsequent renewal thereof;

Now, Therefore, the judgment of the court is as follows:

It is adjudged that the defendant has been convicted of the offense as charged in the complaint.

It is adjudged that the defendant is guilty as charged.

It is adjudged that the defendant is hereby fined the sum of Three Hundred (\$300.00) Dollars and sentenced to thirty (30) days in jail, twenty-nine (29) days of which are hereby suspended, leaving the defendant one day in jail to serve beginning at 9:00 a.m., January 7, 1958.

It is further ordered that the defendant may pay the said Three Hundred (\$300.00) Dollars fine as follows: One Hundred (\$100.00) Dollars on January 7, 1958, and One Hundred (\$100.00) Dollars on the 7th of each month until the entire sum has been paid.

Dated at Anchorage, Alaska, this 7th day of January, 1958.

/s/ J. L. McCARREY, JR.,
District Judge.

Approved:

/s/ CHARLES E. TULIN,
Attorney for Defendant.

[Endorsed]: Filed and entered January 7, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: City of Palmer, Plaintiff above named, and to John D. Shaw, City of Palmer attorney, their attorney of record:

Notice is hereby given, that the Defendant herein, Alfred V. Hagen, hereby appeals to the United States Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, from the Judgment rendered herein, which judgment was entered on the 7th day of January, 1958, and which Judgment is by reference made a part of this Notice of Appeal as fully as if set out herein.

Dated at Anchorage, Alaska, this 7th day of January, 1958.

BOYKO, TALBOT & TULIN,

By /s/ CHARLES E. TULIN,
Attorney for Defendant.

[Endorsed]: Filed January 7, 1958.

[Title of District Court and Cause.]

TRANSCRIPT OF EXCERPT
OF PROCEEDINGS

The Court: This was the time set down for the imposition of sentence in the case of City of Palmer, Plaintiff, vs. Alfred Hagen, Defendant, Criminal No. 3582. Mr. Shaw, you may make your statement.

* * *

The Court: Very well. Mr. Tulin.

Mr. Tulin: Your Honor, I'd like at this time to renew the defendant's motion for judgment of acquittal and I base this motion of renewal upon the court's written decision of December 31, 1957. Now, on page two in the second paragraph of that decision I think the court accurately states the law; which law I am in accord with. In paragraph two it states that the sole issue to be determined by the court in this case is whether one who has collected taxes under a city ordinance authorized by Territorial statute can now refuse to pay said taxes to the tax authority on the ground that the law under which the taxes were collected was illegal and void. Now, as I said, I am in accord with that statement of the law; however, in the factual situation before us the defendant here has never denied the right of his principal to receive the taxes. He has collected them. He has never denied the right of Palmer to have the money. All he says is that he was late in getting it in. He is not charged, you

will note, with failing to pay over the sales tax, but rather he is charged with failing to timely pay that sales tax. * * *

(Mr. Tulin having completed his argument, Mr. Shaw and Mr. Plummer addressed the court, and thereafter the following proceedings were had:)

The Court: Mr. Hagen, will you please come forward with your counsel. Motion for judgment of acquittal is denied. I feel that Mr. Plummer has pointed out the real issue, he felt that if Mr. Hagen wanted to test the constitutionality of the statute he would have refused to have collected everything; having once collected it I feel you are not in position to raise that issue at this time.

* * *

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcription of excerpt of proceedings in the above-entitled cause taken by me in stenograph in open court at Anchorage, Alaska, on the 6th day of January, 1958, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

[Endorsed]: Filed April 4, 1958.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action or proceeding.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from Judgment filed and entered in the above-entitled cause by the above-entitled court on the 7th day of January, 1958.

Dated at Anchorage, Alaska, this 7th day of February, 1958.

[Seal] /s/ WM. A. HILTON,
Clerk.

cc: Charles E. Tulin,
John D. Shaw.

[Endorsed]: Filed February 24, 1958.

[Endorsed]: No. 15926. United States Court of Appeals for the Ninth Circuit. Alfred V. Hagen, Appellant vs. City of Palmer, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed: February 24, 1958.

Docketed: March 12, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 15926

ALFRED HAGEN,

Appellant,

vs.

CITY OF PALMER, ALASKA,

Appellee.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD ON APPEAL

Appellant hereby makes the following statement of points on appeal and designates the following portions of the record as the record on appeal:

1. The District Court erred in denying the appellant's motion for judgment of acquittal.
2. The District Court erred in confirming the conviction of appellant in the Magistrate's Court of the City of Palmer, Alaska, and entering the same as the judgment of the District Court.
3. The District Court erred in upholding the validity of Ordinances Nos. 10, 40 and 48 of the City of Palmer, Alaska, and sustaining a criminal conviction thereunder.
4. The District Court erred in failing to take judicial notice of the repeal of the Territorial Enabling Statute under which the aforementioned ordinances were enacted, prior to enactment thereof.

5. The District Court erred in holding that appellant was "estopped" to deny the validity of the ordinances under which he was convicted.

6. The District Court erred in affirming appellant's conviction on a charge of failure to pay a municipal sales tax, in the face of the stipulated fact that appellant had filed his return and surrendered the tax monies collectable thereunder.

7. The District Court erred in finding appellant guilty, upon trial de novo on stipulated facts, of the charge of wilfully or intentionally failing, neglecting or refusing to comply with the provisions of the sales tax ordinance of the City of Palmer, when the only facts before the District Court indicated a tardy filing of the return, but compliance with the requirements of collection, making of return and paying over of the tax monies collected and nothing was stipulated or offered in evidence with respect to appellant's wilfulness or intent.

8. The District Court erred in finding appellant guilty and imposing sentence merely upon the facts stipulated for the limited point raised by the motion for judgment of acquittal, without further trial de novo or admission of evidence upon the issues of fact not stipulated or otherwise before the court.

9. The municipal ordinances under which appellant was convicted are void.

10. There is no evidence in the record on appeal to sustain a conviction of the appellant of any crime. The District Court in summarily finding appellant guilty and sentencing him in the course of disposing of appellant's motion for judgment of acquittal upon certain stipulated facts deprived appellant of his statutory right to a trial de novo and to trial by jury and thereby deprived him of liberty without due process of law.

Appellant hereby designates the entire record made in the District Court and in the Magistrate's Court of the City of Palmer, Alaska, together with this statement of points and designation as the record on appeal herein.

BOYKO, TALBOT & TULIN,
Attorneys for Appellant,

By /s/ EDGAR PAUL BOYKO.

[Endorsed]: Filed May 13, 1958.

No. 15926

United States
Court of Appeals
for the Ninth Circuit

ALFRED V. HAGEN,

Appellant,

vs.

CITY OF PALMER,

Appellee.

Supplemental
Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILED

NOV 14 1958

PAUL P. O'BRIEN, CLERK

No. 15926

United States
Court of Appeals
for the Ninth Circuit

ALFRED V. HAGEN,

Appellant,

vs.

CITY OF PALMER,

Appellee.

Supplemental
Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

In the District Court for the District of Alaska
Third Division

No. Cr. 3582

CITY OF PALMER,

Plaintiff,

vs.

ALFRED HAGEN,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable J. L. McCarrey, Jr.,
U. S. District Judge.

October 23, 1957—10:50 o'Clock A.M.

Appearances:

For the Plaintiff:

JOHN D. SHAW,

City Attorney, City of Palmer.

For the Defendant:

CHARLES E. TULIN,

BOYKO, TALBOT & TULIN,

Attorneys at Law.

The Court: I am sorry to keep counsel and the litigants waiting in the case of the City of Palmer, Plaintiff, vs. Alfred Hagen, Defendant, Criminal No. 3582. Mr. Shaw, you may make your opening statement. Will you please proceed, Mr. Shaw?

Mr. Shaw: If it please the Court, Mr. Tulin:

This is a case involving the City Sales Tax Ordinance of the City of Palmer, which has been in effect since July of 1951. The Defendant was charged in the Complaint with failure to file his sales tax return in accordance with the provisions of Ordinance No. 40, and he was tried, convicted, sentenced to pay a fine of \$50.00, and he appealed to this Court. Mr. Tulin and I have reached, I think, complete agreement in regard to the material facts on this case and are willing to stipulate to the facts in order to avoid putting on testimony, if that meets with the approval of the Court.

There are one or two matters we didn't reach full accord on, but I think perhaps we can go ahead anyhow and——

The Court: Supposing you go ahead then, counsel, and state into the record your oral stipulation and thereafter I will expect you to reduce it to writing.

Mr. Shaw: Very well, your Honor. I will give our stipulations here, subject to Mr. Tulin's objection, if there is anything he objects to.

It is to be stipulated that Palmer has a Sales Tax Ordinance; [2*] that Section 6 thereof provides for the filing of returns by the end of the following month in which the tax was collected from the public. I should have said Section 6—or, correction—Ordinance 40, as amended, provides that it be paid by the last of the month.

Second, that the Defendant in this case did not

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

make timely filing of his sales Tax Report as required by the Ordinance.

Third, that Section 9 of Ordinance No. 40 provides a penalty of \$25.00 for the first offense and \$100.00 for the second offense.

Next, that the Defendant was in business and did collect sales tax money from the public in the usual course of his business at all times; and

Last, at this time, that he had failed to file his return and make his payments other months, according to the City records, but was charged in this case only with one month.

Is that agreeable?

Mr. Tulin: That is agreeable, your Honor.

The Court: Now, what were the areas that you were not able to agree upon?

Mr. Shaw: Beg your pardon?

The Court: What were the areas in which you were not able to agree upon?

Mr. Shaw: We were unable to agree upon a matter which I probably shouldn't mention to the Court without Mr. Tulin's [3] consent.

Mr. Tulin: I am just wondering, your Honor, if that is the case on behalf of the City of Palmer? If we stipulate to those facts, it will alleviate introducing any testimony on their behalf, and the Defendant is prepared at this time to make a motion, if there are no further stipulations into which we can enter at this time.

The Court: Well, of course, I am concerned about your position. What is your defense?

Mr. Tulin: Well, your Honor, the Defendant

would like to move for a judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, on the grounds that the Palmer Sales Tax Ordinance No. 40 was passed without enabling legislation; that it was without sanction of Territorial law at the time that it was passed, and that it is, therefore, void.

The Court: Well——

Mr. Tulin: The argument I would like to present at this time, your Honor, in support of that motion, if there is nothing further that we can stipulate to. Does the—I might inquire whether the City of Palmer rests at this time.

Mr. Shaw: Yes. Before I rest, though, I would like to state that before the case is finished, I would reserve the right to make one further stipulation. If Mr. Tulin won't agree, we might have to bring it to Court.

The Court: Well, let's have it all at this time so [4] we will know where we are going. What is that proposed stipulation?

Mr. Shaw: Well, your Honor, it is on the question of whether or not a previous conviction should be shown in this matter by stipulation.

Mr. Tulin: It would be my position, your Honor, that it would have nothing to do with the merits, of the guilt or innocence of this particular offense.

The Court: Excepting this, it goes to the weight.

Mr. Tulin: If the Defendant were to take the stand, it certainly would be a matter for credibility but he is not taking the stand. There is no need of

taking the stand. It turns on a question of law, which I propose to argue.

The Court: Well, if the Defendant does not take the stand, then, of course, it would not be proper. Then the Court would propose this: That counsel for the respective litigants prepare a written statement in conformance with the oral statement put into the record this morning. The Court would give counsel for the Plaintiff 20 days in which to present a brief and counsel for the Defendant may have 20 days in which to answer that brief. Then the Court would request that the City reply within 10 days to the answering brief of the Defendant. Is there any objection?

Mr. Tulin: Your Honor, I was wondering whether oral argument could be presented at this time? Are you desirous of [5] hearing oral argument at this time?

The Court: No; I prefer to have you submit your briefs and then argue your case. You see then you would have the law to present to the Court. It would be well for you, as well as it would be for the Court. Any objection to that?

Mr. Shaw: No objection. I would like to go ahead with it today, too, but, if I understand, the Defendant has 20 days in which to file his brief?

The Court: You have 20 days. Now, if you wish to shorten it, I would be glad to do so.

Mr. Tulin: See, I would be the moving party, your Honor. I would submit my brief in shorter time perhaps than Mr. Shaw, and he could file his answering brief. I could file my brief.

Mr. Shaw: The Defendant is the one to file the first brief because he is attacking the validity of the law in which this Sales tax——

The Court: That is correct, yes.

Mr. Tulin: Would it be possible at this time to set the date of the oral argument on the written briefs, your Honor?

The Court: Well, I would prefer to have the briefs in because it has been my experience that counsel always asks for additional time on briefs. Let's get the briefs in and then let's talk about the serious part of it. I know of only one or two exceptions where it has come in on time and that's in four years' experience now, no, over four years' experience. [6]

Mr. Tulin: Are you in accord, Mr. Shaw?

Mr. Shaw: Yes. I will—I would like to have the Court hear it. He might dismiss the motion that we——

The Court: Well, you stipulated to the facts. I think the Court is entitled to your research and then thereafter we could have you argue it and maybe—at that time, you see, it will be concluded in any event, no matter how the Court would rule; the matter stipulated to and submitted to the Court so that there would be an ultimate determination.

Mr. Shaw: Well, I think, your Honor, too, that because of the complexity of the statute, that perhaps the law before the Court would be definitely helpful in seeing the position of the respective parties.

The Court: Yes. Very well, then. I would also

entertain from counsel a shorter time if you want to do so.

Mr. Tulin: Your Honor, I could have my brief prepared within 10 days.

The Court: Could you submit yours?

Mr. Shaw: If he prepares his in 10 days, your Honor, I will have mine a week later.

The Court: Very well, counsel then may have 10 days each way and then the reply brief five days.

Mr. Tulin: Yes, your Honor.

The Court: Very well. That will be the order of the Court, and now let me have it understood clearly that you will [7] reduce this stipulation to writing?

Mr. Tulin: Yes.

The Court: And make that a part of your record here. Very well. That will be the order of the Court then.

Does the Clerk have anything else on her desk at this time?

Deputy Clerk: Nothing on the Clerk's desk, your Honor.

The Court: This Court will go into recess until the call of the gavel. [8]

November 15, 1957

The Court: The next matter is the case of City of Palmer, Plaintiff, vs. Alfred Hagen, Defendant. Criminal No. 3582. You may proceed, Mr. Tulin.

Mr. Tulin: Your Honor, the basis of this motion for judgment of acquittal is upon the fact that the Palmer Sales Tax Ordinance No. 40 was passed at

a time when there was no enabling legislation of any kind in effect.

The Court: Pardon me. May I interrupt you, please? The problem that concerns me most in your case is that you argue that the Act passed concerning school districts, and so forth, also abrogated the sales tax. I have a little difficulty in seeing that.

Mr. Tulin: Well, your Honor, the 1949 Legislature passed the Act which was Chapter 38, which amended 16-1-35, subsection 9. That Act provided in two sections, A and B, first for a general property tax for school and municipal purposes, and, second, for a consumer sales tax. Thereafter in 1951 the Legislature again convened, of course. They did raise the general property act under Section A, but omitted any question at all as to Section B. There's questions along the type of repeal by implication, it seems to me, and I have authority for the fact that since they attempted here to reinstate, that is, to reenact 16-1-35, subsection 9, they say that that section is amended to read as follows, and then they go on to set out the [10] taxes that would exist at that time, and they entirely omit the 1949 amendment as to consumer sales taxes. Sutherland on Statutory Construction holds that in such cases this is a repeal by implication, particularly when the amendment, the consumer sales tax provision is itself an amendment, and when a subsequent Legislature amends the original enactment and omits the 1949 amendment as to consumer sales tax, they thereby repeal by implication which would not necessarily be the case if they had, let's say, just omitted

a section from the original enactment; but the fact I rely on is that the consumer sales tax was omitted. It was omitted from a subsequent amendment, from the original enactment.

The Court: But assuming the sales tax was amended and that the subsequent statutory enactment by amendment failed to include that, and there is no reference made to it in the title, then can't the Court presume and isn't it also a parallel rule of thumb on statutory construction that a statute is presumed to be constitutional?

Mr. Tulin: We have, first of all, your Honor, a presumption against the validity of questionable taxes when the issue clouds the validity of taxes, but, be that as it may, this enactment, the entitlement of the 1951 statute was a general tax for school and municipal purposes; relating to a general tax for school and municipal purposes, then laid out what was to be covered. [11]

The Court: But specifically excludes sales taxes.

Mr. Tulin: But, your Honor, in my reply brief here I point out to the Court that whenever you have an amendment, that the subject or the title to the statute shall include only one subject. Now, they didn't come out and say, "We repeal the 1949 provision of consumer sales tax." They didn't do that, but it is not necessary.

The Court: Pardon me just one moment, please. Mr. Johnson, will you go to my secretary and have her bring the recent decisions from the Ninth Circuit Court of Appeals? I would call your attention to a case that was decided just recently, not re-

cently, in June of this year, concerning the question of repeal and amendment concerning the American Can case. It was a case that was heard in the First Division and it's a good discussion along the lines that you are now urging upon the Court. "When there is a doubt as to the intent of the Legislature, one way of resolving that might be to the title of the Act."

Mr. Tulin: Well, here the title, of course, is a general tax for school and municipal purposes; in other words, the subsections are A, B, and C. Whatever they wish to add would cover a general tax for school and municipal purposes. They have a property tax. They later put in the consumer sales tax in '53 again and they put in a tax on vessels for the general purpose as set out in the title.

The Court: I call your attention to Chapter 38 of the [12] 1949 Session Laws of the Territory of Alaska when it says in the title, "To empower City Councils, pursuant to referendums, to levy sales taxes within their respective municipalities." Now, let's go to your 1951—what is the chapter in 1951?

Mr. Tulin: That is Chapter 47, your Honor. You will note there, your Honor, it omits entirely any mention of sales taxes.

The Court: That is the point I am making. That is the very point I am making.

Mr. Tulin: But they do point out, your Honor, that Section 16-1-35, ACLA 1949, as amended by Chapter 38, pertaining to a general tax for school and municipal purposes is amended to read as follows. Now, it is my position there that the omis-

sion—certainly they allege right in the title that this is all inclusive. It embraces the subject of general taxes for school and municipal purposes and to satisfy the needs of cities of the first class. “We are going to permit a tax on real property,” and notice how they raised it by that very session law. They raised the permissible amount to three per cent, I believe from two to three per cent, but elected to deny the cities of the first class “the ability to levy retail sales taxes.”

The Court: Let’s go back to the 1949 Compiled Laws. No. 9 provides specifically, “General tax for school and municipal purposes.”

Mr. Tulin: Your Honor, the 1949 Session Laws provide, [13] “To empower City Councils, pursuant to referendums, to levy sales taxes within their respective municipalities and so on.” Then you come to your 1951 Session Laws and it says, “Amending Subsection 9 of Section 16-1-35, ACLA 1949, as amended, pertaining to a general tax for school and municipal purposes. Now, it says nothing about the sales tax whatsoever. You could amend a portion of the amended section, but it need not necessarily repeal the entire section.

Your Honor, I rely upon Page 423 of Sutherland on Statutory Construction and the cases cited there reflect that with a factual situation, such as we have here, that we do have a repeal by implication, particularly in light of the fact there is a strong presumption of the action; also, the fact in ’53 the Legislature came back again and put in the consumer sales tax certainly indicating their intent at

that time. It certainly reflects the fact that they realized they had omitted it in 1951.

The Court: What is the chapter in '53?

Mr. Tulin: That is Chapter 121, your Honor. Let me go one step further in that same case. It says, "And validating sales taxes already collected and declaring an emergency." Certainly, isn't that realization that they didn't have an enactment in effect in '51? They attempted to cure it in '53 by saying, "Any taxes collected before this date are valid." They didn't say, "Any ordinances passed prior to this date are valid." They say, "any taxes collected were valid" and that is not the [14] issue here. They didn't validate the ordinance. They only validated taxes collected, but they did realize and they expressed their intent there, "We realize we didn't have a law in effect prior to this date," and that's why that provision.

The Court: The case I am referring to is the Territory of Alaska, Appellant, vs. American Can Company, Fidalgo Island Packing Company, et al., Appellee. No. 15,070, decided June 27, 1957.

Mr. Tulin: I might point out——

The Court: Just a moment, please. And calling your attention particularly to Page 5, "Title saving section of the repealing act overrides general saving statute," which I think would be very much in point in this case. They cite here particularly, "Where doubt exists as to the meaning of the statute, the title may be looked to for aid in its construction."

Mr. Tulin: But we are—at a later date, two

years later, they come back and realizing they had omitted it, attempt to put in a savings clause which is inadequate because it only says "taxes collected." It doesn't validate the ordinance. They express this intent, it is quite apparent.

The Court: Excepting this, counsel, we have a general savings statute that may have saved that portion of the original act which was not amended and the argument or discussion of the law on that point is, I think, very well set out here.

Did you have anything else? I didn't mean to interrupt. [15] I just wanted to get the real issue of the problem before the Court.

Mr. Tulin: I might just point out one thing. Consumer sales taxes was the entitlement of the '49 provision. It did include the sales tax and it did also in 1953, but in 1951 it was entirely omitted and I think that bolsters the position that in 1951 they intended to omit the sales tax portion.

The Court: Very well. Mr. Shaw, the Court will hear you then.

Mr. Shaw: If it please the Court and Mr. Tulin, I'd like to make this very brief statement. While this case is heard on stipulation, and thereby obviating the necessity of evidence being presented before the Court, this is more than a technical violation of a city ordinance or a law. This case represents a serious culmination of most reprehensible conduct on the part of the Defendant in that he has collected sales taxes from the people of Palmer and the surrounding area, actually collected the money in the operation of his business, and carried that money

in his pocket or used it, or whatever he may have done with it, for months without rendering and filing a return or surrendering it to the City of Palmer.

The Court: Then do I understand he has taken advantage of the Act, then at this time endeavors to state that the Act is not constitutional?

Mr. Shaw: Indeed he has, your Honor. [16]

Mr. Tulin: Are those facts in the stipulation before the Court here? Are those particular facts as to whether or not he has actually collected the tax?

Mr. Shaw: The fact is stipulated that he did collect the tax from the public, unquestionably.

The Court: That's a very important point. That's tantamount to having your cake and eating it, too.

Mr. Shaw: That is Item 2 of the stipulation of facts, your Honor.

The Court: Just a moment. Let me get this in the file.

Mr. Tulin: Your Honor, I'd like to point out that the charge is failure to pay the tax on time. The tax has been paid. The tax has been paid with penalty and with interest to the City. The only charge here is failure to pay it on time.

The Court: Number 2, "That the defendant collected sales tax from the public, in the usual course of his business, during the month of August, 1956, in accordance with the requirements of Ordinance No. 40." Then the next one, Number 3, "That the defendant failed to make timely filing of the sales tax return as charged in the complaint." Were these taxes paid to the City under protest?

Mr. Shaw: No, your Honor, never.

The Court: Well, it appears to the Court then there isn't much use of hearing any further argument on the matter, [17] unless you have another point.

Mr. Shaw: If it please the Court, I would like to call your attention to the fact that there is one stipulation, Number 7, which was agreed to on condition that it be used only for the purpose of sentencing in case the Defendant is found guilty. He has been convicted previously——

Mr. Tulin: I don't think we have resolved the issue. I think very definitely there is an issue before the Court. He was charged with failing to pay his tax on time. He actually went in and paid it before the time—it wasn't—it was served on him, arresting him.

The Court: Well, but my question was whether or not he paid those taxes under protest.

Mr. Tulin: He didn't perhaps make a written protest, anything of that sort when he made payment, but he very definitely did. He objected to the tax. That was the reason for his delinquency.

The Court: There is no stipulation to that effect.

Mr. Tulin: I think, certainly, the Town of Palmer stipulates to that fact.

Mr. Shaw: Your Honor, it would be utterly impossible in this case. This man has missed so many months of bringing in his tax that perhaps it would be better if we proceeded here and your Honor heard it all. I agreed to this matter of stipulation in hopes of saving time here and it's all to the ad-

vantage [18] and benefit of the Defendant that we do stipulate, but there were so many months of violations, which he can never deny, that it would be utterly fantastic to consider such a stipulation.

Mr. Tulin: Could I have one last word?

The Court: Let me ask you this, Mr. Tulin: How can a person come in and contest the validity of a statute and ordinances on taxes when the taxes were not paid under protest?

Mr. Tulin: This is a criminal penalty, your Honor, he is contesting.

The Court: Yes, but the statutory validity of the statute is here in question.

Mr. Tulin: He can't be penalized under a statute which was passed without enabling legislation, something that is void. Can he be penalized in a criminal action here now for filing his return late when the statute itself was void? And, your Honor, I have just one last and closing—I wonder if I could cite this one last citation to the Court?

The Court: Very well.

Mr. Tulin: Found in Sutherland on Statutory Construction, Page 423, and it says, "As a general rule, if the new amendment—and the new amendment here would be the 1951 provision—if the new amendment purports to set out the original act or section—that would be 16-1-35, as amended—generally indicated by the phrase 'to read as follows,' and fails to re-enact the prior amendment—which would be the '49 provision—therein the [19] prior amendments are considered repealed," and there are numerous Federal cases to support that contention.

Mr. Shaw: If it please the Court——

The Court: Yes.

Mr. Shaw: I think there's another aid in the rules of construction for a Court on these things. I'd like to call your Honor's attention to the Organic Act which says, "No law shall embrace more than one subject which shall be expressed in its title." Back to your Act of 1951, there is nothing in the title pertaining in any way to the sales tax provision, mentioning it in any manner. The only reference is made to that general tax for general purposes and here is the wording pertaining to a general tax for school and municipal purposes, "That heading on general tax action which involves real and personal property, has been carried all the way through since there has been legislation on the subject and the sales tax part has always been under a different heading." To follow the argument of the Defendant's counsel here, that the act, the sales tax act could have been repealed by implication would come in bold and sudden conflict with the Organic Act which says the subject must be expressed in the title. They didn't mention the sales tax act. They didn't say they were repealing it. They didn't make any reference to it; the only reference was to the property tax which they amended and made a change.

Mr. Tulin: Your Honor, to absolutely rebut the motion, [20] I'd like to cite 9 Alaska 573, which states, "If it is an amendatory act, then this rule does not apply"; in effect, does not apply in a case like this. 9 Alaska 573.

The Court: Are counsel through then?

Mr. Shaw: I have one thing more to say, your Honor. If Mr. Hagen, the Defendant, had an honest conviction and were going to contest this case, as has been stated here, his remedy was not to collect the taxes. That is what he should have done, is failed to refuse to collect it, then he could have his test, but when he collected it from the public and didn't surrender it to the City, he's in direct——

The Court: Well, but my big concern is when the taxes were collected by the Defendant and then paid, but not paid under protest. That's the thing that bothers me at this time more than any other point.

Mr. Tulin: It's our position that he verbally protested. He paid it under protest and that intent of his was expressed to the people concerned, although it wasn't in writing, your Honor.

The Court: Well, the best evidence of that, of course, would be the record to that effect and I am bound by the record.

The Court will have to reserve decision, as of necessity. [21]

January 6, 1958

The Court: This was the time set down for the imposition of sentence in the case of City of Palmer, Plaintiff, vs. Alfred Hagen, Defendant. Criminal No. 3582. Mr. Shaw, you may make your statement.

Mr. Shaw: If it please the Court, I think I am impelled to say something about Mr. Hagen's culpability in this matter. He has been convicted one

other time before under the same identical charge of failure to file his sales tax return and pay his money into the City of Palmer and at that time, if my memory is correct, he was seven months behind. The thing I want to point out is that every time Mr. Hagen has failed to pay his tax return to the City under the Sales Tax Ordinance, that when he did pay it, it always showed that he had collected it regularly in the course of his business during the period for which he had not paid, so it amounted in every case to a withholding of public money, money collected from the people who patronized his business and failing to turn it over to the City by the 10th of the following month, as required by the law.

I have in my pocket Mr. Hagen's tax record from the City files beginning back as early as 1952 and while I haven't checked it over in detail, it shows that most of the payments were late; only a very few of his payments in the period of five years have been made on time, but in between he would fall further and further behind, as I said, to the point where he in one instance went [23] seven months. And in the case at hand, while he was charged with failure only to pay for one month, he was in fact three months behind at that time, but he was charged only with one and that is what he is being prosecuted on.

The City Council—I am the City Attorney, have been for several years—and the City Council, your Honor, repeatedly brought to Mr. Hagen's attention, to the Mayor's attention and to others, the

failure of Mr. Hagen, along from time to time with other people who also failed to pay in their returns. There are other people at Palmer, just a few cases, but there have been others who have been arrested, charged, tried and convicted for this same thing. Since the last arrest in this regard, a few months ago, we have had no trouble except in the case of Mr. Hagen.

Now, he used to be the Mayor of Palmer. He served with distinction for several years on the City Council and——

The Court: Pardon me. Was he the Mayor and/or City Councilman during the time this sales tax was collected and enforced?

Mr. Shaw: That is correct, your Honor. As Mayor he was charged with the duty, while he was Mayor, of enforcing this very ordinance and I think that due to his position of trust and honor at that time in the City, that it behooves him to be a better citizen than the average even, if necessary, and to act in good faith and I think that in view of the long record of his [24] delinquencies and his failures to pay the money he has collected from the people into the City Treasury, when the City was in desperate need for it—the City of Palmer for years has operated on a sales tax, now we have a small property tax just this year—but I think that some form of punishment should be provided to act as a deterrent to this sort of procedure that has gone on for such a long period of time and I have already recommended in my pleadings that he be fined the maximum and I feel candidly, your Honor,

that this case calls, in all fairness and justice, for some kind of a jail sentence; a 30-day jail sentence suspended, your Honor, I respectfully submit or perhaps one day in jail to serve.

The Court: Thank you. Very well, Mr. Plummer, did you wish to add anything to that?

Mr. Plummer: No, your Honor, other than what I have said in the presentence conference in your chambers. I am sympathetic with the position taken by Mr. Shaw and I feel that something should be done to deter this type of activity on behalf of the other citizens of the Palmer area.

The Court: Very well. Mr. Tulin.

Mr. Tulin: Your Honor, I'd like at this time to renew the Defendant's motion for judgment of acquittal and I base this motion of renewal upon the Court's written decision of December 31, 1957. Now, on page two in the second paragraph of that decision I think the Court accurately states the law; which law I am in [25] accord with. In paragraph two it states that, "The sole issue to be determined by the court in this case is whether one who has collected taxes under a city ordinance authorized by Territorial statute, can now refuse to pay said taxes to the taxing authority on the grounds that the law under which the taxes were collected were illegal and void." Now, as I said, I am in accord with that statement of the law, however, in the factual situation before us, the Defendant here has never denied the right of his principal to receive the taxes. He has collected them. He has never denied the right of Palmer to have the money. All

he says is that he was late in getting it in. He is not charged, you will note, with failing to pay over the sales tax, but, rather, he is charged with failing to timely pay that sales tax.

Now, for the reason primarily then that the tax has been paid and it was paid just prior to or at the time of his arrest, I think then that we do have to consider the validity of the original—or, the amendatory statutes or the ordinances here in question before we can impose a criminal sentence against him.

The Court: Pardon me. Let me check the record. If I am reading from the proper complaint, the complaint reads as follows: "Alfred V. Hagen is accused by Bernard R. Bouwens in this complaint of a misdemeanor, that of failure to file sales tax returns committed as follows, to wit: The said Alfred V. Hagen, d/b/a Valley Theatre in the City of Palmer, Alaska, and within the [26] jurisdiction of this Court, did, wilfully fail to file a sales tax return for retail sales and service made and performed during the month of August, 1956 * * *"

Mr. Tulin: Your Honor, I call your attention again to the memorandum of December 31, that is paragraph three of the stipulation. It states, "That the defendant failed to make timely filing of his sales tax returns as charged in the complaint," and I felt that that stipulation clarified the position taken by the City of Palmer. That it was the failure to timely pay the tax return.

The Court: Well, in that respect I am surprised that counsel for the City would enter into such a

stipulation when the complaint is to the contrary. There has been no denial of the complaint itself. I didn't check that. Anyway, you may proceed.

Mr. Tulin: Your Honor, then we come to the position where in fact the Defendant has not denied the right of his principal to receive the taxes and has, as indicated in the file here, he paid them either just before or at the time of his arrest, paid not only the taxes, but the penalty and the interest therewith.

Now, it is my position that that being true, we come to the issue of whether or not criminal sanction, as involved in Ordinance No. 10, can be applied against this man and whether he can be sentenced pursuant to the criminal portions of the [27] ordinance. It is my position that when we consider the criminal aspect of the thing, that it is necessary for us to determine the validity of the original and the amendatory statutes and thus the ordinance in issue here. On page two of the Court's opinion, again referring to that page, in paragraph three, it states that, "I am of the opinion and hereby find that it is not necessary for the Court to determine the validity of the original or amendatory statutes or the ordinances here in question, for the reason that the defendant collected said taxes in question, and, therefore, is now precluded from challenging the constitutionality of such statutes." And later the Court stated, "That he cannot now deny the right of his principal to receive the money," and I just point out to the Court he has never denied the right of the principal to receive the money. He has just

been late in paying it over. Now, when we consider the criminal portion of that ordinance, we have got to resolve the validity of that ordinance or we'd be sentencing this man under illegal statutes and that cannot be done.

The Court: Mr. Shaw, do you wish to reply?

Mr. Shaw: If it please the court, I would point out that he has been charged and plead guilty to the same offense on a previous occasion, as the record shows, and the use of the word "timely" in there is immaterial. The ordinance provides that the sales tax return must be filed on or before the 10th of the following month. Now, for the purpose of this action, Mr. Hagen [28] was only charged with one month, particularly the month of August, I believe, but he was charged with failing to file his sales tax return as required by the ordinance and, of course, implied with the failure to file the return is failure to pay. One can't pay the tax until he files the return. There is no way he knows how much it amounts to.

The Court: I am interested in hearing you on the point Mr. Tulin makes in that he renews his motion for judgment of acquittal because now he says he is in position to challenge the constitutionality of the statute and the ordinance.

Mr. Shaw: I don't understand, your Honor.

The Court: Well, you heard Mr. Tulin make the motion to the Court for judgment of acquittal because now he feels that the Defendant has paid the taxes, that he failed to pay heretofore, into the

proper authorities and now he wants to challenge the constitutionality of the statute itself.

Mr. Shaw: I think it's too late for him to challenge the constitutionality of the statute now, your Honor. When the 10th day of October—I hope I have my dates correct here—of September arrived and passed and Mr. Hagen hadn't filed his return and paid the money in for the previous month, he was in violation of the statute and subject to the criminal penalties thereof, and, as such, he has been charged.

Mr. Tulin: Your Honor, just in brief rebuttal, I'd like to point out there is no law of estoppel to sentence a man [29] under illegal statutes. It may be grounds for him to pay money to the City, but no justice for sentencing him under an illegal or void statute and that issue would have to be determined, could not be resolved on just the law of estoppel or equitable estoppel or trust.

The Court: Mr. Plummer.

Mr. Plummer: I am not familiar with the case and probably should not say anything, your Honor, but it would appear to me that if the Defendant Hagen wished to challenge the constitutionality or the validity of the ordinance the time to have done it would have been at the time when he was supposed to collect this tax from the people. What he did, if I understand the facts correctly, was to, every time the customer came in he would collect the tax. Now, he had to collect it under this ordinance. That was his only authority for doing so, collecting it for seven months and putting the money in his pocket

or used it in his business, then it would appear to me it would be an awfully, awfully poor place to challenge the validity of the ordinance. I think what he should have done, if he thought the ordinance was invalid, was refuse to follow the ordinance rather than collecting the money and going along saying, "It's all right. It's a good ordinance as far as collecting goes. It's only bad when I have to pay it out." That doesn't make sense to me.

Mr. Tulin: Your Honor, there is one thing that I'd [30] like to emphasize in this matter of law. We are not here playing with emotions or which would be the best route to attack the constitutionality of this statute because I think it is pretty clear by this time that this Defendant was not attempting to attack the constitutionality at the time, but, rather, he was dilatory or late in getting the money in, but even at that it is a question of law whether you can sentence a man under an illegal or void statute. That cannot be done. Maybe it is grounds to say you have, you as the Defendant have to pay the moneys you have collected over to the City. You are in a position of trust in collecting them, but it doesn't, it can't create validity to a statute which possibly is void and that issue of the validity of the statute certainly has to be resolved before we can sentence this man.

The Court: Mr. Hagen, will you please come forward with your counsel?

Motion for judgment of acquittal is denied. I feel that Mr. Plummer has pointed out the real issue, he felt that if Mr. Hagen wanted to test the constitu-

tionality of the statute, he would have refused to have collected everything: having once collected it, I feel you are not in position to raise that issue at this time.

Mr. Hagen, do you have anything to state before the Court imposes sentence?

Defendant Hagen: I'd just like to bring out that upon [31] paying my tax and paying the penalty and interest, and each and almost every time the penalty and interest was paid, if I was behind on my payments, and I was on this charge of August, whatever it was, I paid the penalty and the interest prior to the time that they served the warrant on me and at that time Mr. Shaw was standing there and watched the procedure. I got a receipt from the City Clerk at the time in which he noted that the penalty and interest was paid and I, myself, feel that the penalty clause was put in there for people who are behind or get behind on their payments, the same as your light bill, the same penalty and interest is put on your income tax if you are behind, and I paid the penalty and paid the interest and they accepted it and then they turn around and throw the criminal charge against me. That's all I want to say.

The Court: Of course, they have two distinct rights, you understand, Mr. Hagen. They would have the right to civilly collect those taxes, interest, and penalty, as they have done, and file a criminal charge, which is the case before the Court. Do you have anything else to state to the Court?

Defendant Hagen: Well, yes. Mr. Shaw has

brought out that I was behind one other time. That is true. I was behind one other time. Mr. Shaw and a few of them decided they were going to get tough on some of the businessmen. I was one of them. The City Clerk called me up, so I went up there. He said bring your sales tax, so I went up. I said, "I have only got two or [32] three months completed," and I paid it, paid the penalty and interest. He said, "When can you get the other in?" I said, "I will work all night and come in tomorrow morning and pay it." I did. I worked practically all night to get my files together, my bookkeeping. I went down there and paid it. On the way to pay I had the paper stuck in here and they served the papers on me. It's a personal deal entirely between John Shaw and myself. That is what it is and the matter involved the City Clerk, who also was a judge, and he told me before the time he sentenced me, "I am going to run you out of town." He said, "I helped run Colonel Olson out. I am going to run you out." He made that statement behind the desk, fined me, and John Shaw sat there on the same deal with him.

Mr. Shaw: Maybe this is not the time for me to inject, but this is wholly, completely untrue, what this man is saying here. It is an insult to the intelligence of the Court for him to be trying to testify in this case on things like this. Why didn't he take the witness stand when the case was called here instead of stipulating if he had something like this to tell? I object. It is completely false.

The Court: The Court always grants defendants coming before it an opportunity to express them-

selves and he has been accorded the same opportunity. Do you have anything else you'd like to state?

Mr. Tulin: I haven't spoke at all in mitigation. I'd [33] like to point out this is similar to collecting Government money, money which was never his, and like to point out to the Court, as the Court is very familiar, numerous businesses in this area sometimes get behind on the payment of those things, just as this man did, but if the case were the Internal Revenue, as long as there is no fraud involved or deceit, all that is charged is penalty and interest. As provided by this ordinance, the City of Palmer, I'd like to point out I don't think the code element is sufficient to impose a substantial sentence in this case.

The Court: I don't quite share your viewpoint, Mr. Tulin.

Mr. Tulin: Your Honor, it's a case of becoming delinquent, mismanagement in bookkeeping. It's not intended to defraud.

The Court: Well, counsel, though, in this case your client is a former mayor and also former councilman and he saw that this matter was fully enforced, apparently, at the time he was in charge.

Mr. Tulin: Yes, your Honor, but I think, as has been pointed out, there are numerous people who get behind, very prominent people. It's mismanagement; not intent not to pay or concealing of the City's moneys; just perhaps not making quite enough money or the bookkeeping is unsound or administrative procedures are lacking, but there is no

intent to take the City's money here. He never denied owing it. He never refused to pay [4] the City. That is what I emphasized.

The Court: Well, Mr. Hagen, it is the judgment and sentence of this court that you, in conformance with the recommendation of Mr. Shaw and Mr. Plummer, that you be fined the sum of \$300.00.

It is the further judgment and sentence of this court you be committed to the United States Marshal of the Territory of Alaska or his duly authorized representative for a period of 30 days, 29 days thereof to be suspended. That means one day to serve. You may step down. I request you submit yourself to the United States Marshal tomorrow morning at the hour of 9:00 a.m. to serve that time.

Mr. Shaw: Would you like for me to prepare the judgment, your Honor, or the District Attorney?

The Court: Well, counsel can work that out among themselves as to how that is accomplished.

Mr. Tulin: Your Honor, could some provision be made for the payment of this money because of the financial condition of the defendant?

The Court: I have no objection to such a proposal. What would you recommend?

Mr. Tulin: About \$100.00 a month, your Honor. \$100.00 now and \$100.00 a month, if that would be satisfactory with the City Attorney of Palmer.

The Court: Any objection, Mr. Shaw? [35]

Mr. Shaw: I have no objection.

The Court: When will the first payment be made, Mr. Tulin?

Mr. Tulin: Tomorrow, your Honor.

The Court: Very well, and then on the 7th day of each month thereafter until the total sum of \$300.00 has been paid. Now, Mr. Tulin, will the Defendant waive his right to be present upon the formal presentation of the judgment?

Mr. Tulin: Yes, he will, your Honor.

The Court: Very well, you may be excused then. You understand now, the Defendant is to report tomorrow morning to the United States Marshal.

Mr. Tulin: Would you inform the Defendant here the exact hours of that confinement?

The Court: For one day and I said 9:00 o'clock, if that is not too early.

Mr. Tulin: I wonder, your Honor, perhaps—the way it is snowing I wonder if perhaps we could make it a little later in the day; just a possibility there may be some problem getting back here in Anchorage.

The Court: Mr. Shaw, what would be your position?

Mr. Shaw: I agree, your Honor. The roads are slippery and you never know how long it is going to take to get in. I am perfectly willing to give him some extra time.

The Court: Well, I point out to you, Mr. Tulin, you [36] better bear the welfare of your client in mind—if he comes in early then he can get it over with in one day, but if he doesn't then that means he will have to stay overnight. So I think it would be to his advantage to be in here early.

Mr. Tulin: Is this a 12-hour day we are referring to?

The Court: That is a matter that will have to be determined by the Alaska Jail System. He is sentenced to serve one day, and what that consists of I am not in position to technically advise you. Can you help us, Mr. Plummer?

Mr. Plummer: No; I cannot, your Honor.

The Court: They have rules and regulations that would define that in detail.

Mr. Tulin: Your Honor, if he finds it is a 24-hour period, he could be committed this evening and stay right in town as long as he is here.

The Court: Nothing wrong with that. As a matter of fact, that might be the simplest way out.

Mr. Tulin: Thank you, your Honor.

The Court: Is that your wish at this time?

Mr. Tulin: I will speak with the Defendant about it.

The Court: I must know that because I must get the United States Marshal.

Mr. Tulin: Your Honor, the Defendant is carefully considering his right of appeal in this particular case and perhaps it is a little premature for him to decide whether [37] to serve the time. I think perhaps in light of that fact we better leave it go until tomorrow.

The Court: Then is 9:00 o'clock the time?

Mr. Tulin: Could we make it 10:00 o'clock?

The Court: Well, then, would you bear in mind it may be necessary for him to stay overnight tomorrow night?

Mr. Tulin: I will, your Honor.

The Court: Without objection then that will be

the order; report tomorrow morning to the United States Marshal at 10:00 a.m. Counsel may be excused.

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcription of proceedings in the above-entitled cause taken by me in stenograph in open court at Anchorage, Alaska, on November 15, 1957, and January 6, 1958, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD. [38]

[Endorsed]: No. 15926. United States Court of Appeals for the Ninth Circuit. Alfred V. Hagen, Appellant, vs. City of Palmer, Appellee. Supplemental Transcript of Record. Appeal From the District Court for the District of Alaska, Third Division.

Filed October 15, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.



No. 15,926

IN THE
United States Court of Appeals
For the Ninth Circuit

ALFRED V. HAGEN,

Appellant,

VS.

CITY OF PALMER,

Appellee.

Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF OF APPELLANT.

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FILED

SEP 3 - 1958

PAUL P. O'BRIEN, CLERK



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I.

Sales tax ordinance No. 40 of the City of Palmer, Alaska, having been enacted without referendum, after repeal of a prior, similar ordinance (No. 10) based upon a referendum held without legislative sanction, is void, because the 1949 Territorial enabling act authorizing cities to levy a sales tax was repealed in 1951 before the holding of the referendum and the enactment of the first

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sales tax ordinance and the new (1953) enabling act, upon which such ordinance No. 40 was based, again required the holding of a referendum which was not done	9

II.

The judgment of conviction here appealed from is invalid upon the face of the record, because of a fatal variance with the complaint or information upon which it is based and because it is wholly unsupported by the stipu- lated (and only) facts in this case	32
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III.

When the District Court, after hearing a motion for judg- ment of acquittal, submitted upon stipulated facts, denied the same and thereafter proceeded, summarily, to find appellant guilty, pronounce sentence and enter judg- ment, without further trial or hearing of any kind, and without the aid of a jury, contrary to the mandatory provisions of Alaska law, the appellant was thereby de- prived of "due process" of law in a criminal proceeding in which his liberty and property are in jeopardy	34
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No. 15,926

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ALFRED V. HAGEN,

VS.

CITY OF PALMER,

Appellant,

Appellee.

Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF OF APPELLANT.

JURISDICTIONAL STATEMENT.

The District Court had jurisdiction of this case by virtue of the provisions of Sec. 16-1-70, Title 53, Chapter 2, and Title 69, Chapter 6, Alaska Compiled Laws Annotated, 1949, and 48 U.S.C. 101 and 193. This Court has jurisdiction by virtue of 28 U.S.C. 1291, which provides that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, etc., except where a direct review may be had to the Supreme Court; and 48 U.S.C. 1294 which designates this

Court as the appropriate court for appeals from such judgments in the District Court for the District of Alaska.

STATEMENT OF THE CASE.

The appellant, Alfred V. Hagen, was charged in the municipal magistrate's court of the City of Palmer, Alaska, with wilful failure "to file a sales tax return for retail sales and services * * * performed during the month of August 1957, in violation of Section No. 6, Ordinance No. 40" of the City of Palmer (Record, pp. 3-7). His motions to quash the warrant of arrest and dismiss the complaint—on the ground that Ordinance No. 40 of the City of Palmer was invalid "as being without sanction of Territorial law" and that therefore the magistrate's court lacked jurisdiction—were denied (R., pp. 4, 9). A motion to disqualify the magistrate, on the ground that the said magistrate was also the city clerk of the City of Palmer, charged with the responsibility of making sales tax collections and therefore directly interested in the successful prosecution of the case, was likewise denied. (R., p. 8).

A trial was had before the magistrate who entered a verdict of guilty and sentence of conviction. Timely notice of appeal to the United States District Court for the District of Alaska, Third Division, was given (R., p. 4) and the cause transferred to that court for trial *de novo*, under the provisions of Sections 16-1-70 and 69-6-1 through 11, ACLA 1949. In the District Court, appellant filed his motion for a judgment of

acquittal (R., pp. 13-14) and in accordance with standard practice (*vide infra*), submitted a stipulation of facts in support of said motion, for the purpose of raising the legal issue of the validity of the ordinance under which he was convicted in the magistrate's court (R., pp. 14-16). Oral argument on this motion was had before the District Court by counsel for both sides and the matter was submitted (R., p. 46).

On December 31, 1957, the District Judge filed a memorandum opinion and order, denying the motion for judgment of acquittal (R., pp. 48-51) and, without further opportunity for hearing and without any additional evidence being adduced—with the exception of an affidavit theretofore filed by appellant (R., p. 47)—set the matter down for imposition of sentence. Accordingly, on January 6, 1958, the court pronounced sentence of imprisonment and a fine (R., pp. 51-52) and on January 7, 1958, there was entered a judgment of conviction (R., pp. 53-55). Notice of appeal to this Honorable Court was timely filed (R., p. 55).

STATEMENT OF THE FACTS.

On March 14, 1949, there was approved Chapter 38, Sessions Laws of the Territory of Alaska, 1949, being an act "to empower City Councils, pursuant to referendums, to levy sales taxes within their respective municipalities; and amending subsection Ninth of Sec. 16-1-35 ACLA 1949." The full text of this statute is set forth as Appendix A to this brief.

The statute just cited was amended in the 1951 Session of the Territorial Legislature, by the enactment of Chapter 47, SLA, 1951, approved March 21, 1951 and entitled "An act amending subsection Ninth of Sec. 16-1-31 ACLA 1949, as amended by Ch. 38, SLA 1949, pertaining to a general tax for school and municipal purposes." The full text of this statute is set forth as Appendix B to this brief. This act eliminated clause (b) of subsection Ninth—previously added by the 1949 statute cited above—which had contained authority to levy sales taxes pursuant to referendum. The repealing statute became effective June 21, 1951.

On July 10, 1951, the City Council of the City of Palmer conducted a sales tax referendum and more than 55 percent of the voters approving, there was enacted on August 8, 1951, Ordinance No. 10 of the City of Palmer, a sales tax ordinance, effective September 1, 1951 (R., pp. 33-45).

Representations on behalf of various municipalities were made to the 1953 Session of the Territorial Legislature, with respect to the aforementioned repeal of the municipal sales tax authority. These resulted in the enactment of Chapter 121, SLA 1953, approved March 30, 1953, effective immediately, which added a considerably revised,¹ new clause (b) to subsection Ninth, cited above, and added the following proviso:

¹Changes made are: Included rents as one of the subjects upon which the sales tax might be levied; decreased from 55% to a simple majority the vote necessary at a referendum; and added a provision to the effect that sales tax propositions shall not be presented to the voters more often than once a year.

“Section 2. All sales taxes heretofore levied and collected by municipalities within the Territory of Alaska, pursuant to ordinances which were valid at the time of their enactment, are hereby ratified and confirmed.”

The full text of this statute is set forth as Appendix C to this brief.

Acting under this authority, but *without referendum*, the City Council of the City of Palmer enacted a new sales tax ordinance, designated Ordinance No. 40, which repealed the previous Ordinance No. 10 and re-enacted, with some small changes, the provisions thereof, reciting the 1951 referendum. This new ordinance was passed and approved on December 22, 1953, effective January 1, 1954 (R., pp 16-31). It was amended by Ordinance No. 48, effective June 1, 1954, which increased the maximum penalties set forth in the sales tax ordinance² to a fine of \$300 and imprisonment for not more than thirty days, or both such fine and imprisonment (R., pp. 31-32). Thereafter, the City of Palmer proceeded to levy and collect sales taxes under this ordinance.

The appellant Alfred V. Hagen, is the owner and operator of a motion picture theater, known as the Valley Theater, in the City of Palmer (R., p. 6). He was a member of the City Council of that city when ordinances Nos. 10 and 40 were enacted and voted favorably thereon; he served as mayor of the City of Palmer from October 1952 until October 1953

²As well as all other municipal ordinances of the City of Palmer, No. 1 through No. 47, inclusive.

and was a member of the City Council of said city during August and September of 1956 (R., p. 49), the time of the alleged offense. On November 15, 1956, a sworn complaint was filed, by one Bernard R. Bouwens, chief of police of the City of Palmer, with the municipal court of said city, before L. C. Stock, municipal magistrate, who also serves as city clerk (charged with the duty of collecting sales taxes; R., p. 8). This complaint charged the appellant with "a misdemeanour, that of failure to file sales tax returns" and alleged that appellant "did wilfully fail to file a sales tax return for retail sales and service (*sic*) made and performed during the month of August 1956, in violation of Section No. 6, Ordinance No. 40" of the City of Palmer (R., pp. 6-7).

The magistrate thereupon issued a warrant of arrest and appellant was apprehended (R., pp. 5, 14). He was released and obtained counsel who thereafter filed the motions to disqualify the magistrate and to quash the warrant of arrest and dismiss the complaint, referred to above (*vide supra*, Statement of the Case, at p. 2 of this brief. There, followed the proceedings set forth in the foregoing Statement of the Case.³ From the resulting judgment of conviction in the District Court for the District of Alaska, without trial *de novo*, without trial by jury (the same not having been waived) and based only upon stipulated facts—submitted in support of a motion for judgment of ac-

³Evidence adduced before the magistrate indicated that appellant had filed his return and paid over the tax on November 15, 1956, the day the complaint was filed and warrant issued, but prior to service thereof (R., pp. 1, 4, 15, 49).

quittal and for the purpose of aiding the District Court in deciding an issue of law believed to be dispositive of the case (in accordance with standard practices of said court)—appellant has appealed.

ISSUES PRESENTED AND SPECIFICATIONS OF ERRORS.

1. Is Ordinance No. 40 of the City of Palmer, Alaska, void, as having been enacted without referendum, after repeal of a prior, similar Ordinance (No. 10), which provided for levy of a municipal sales tax, based upon a referendum, but without legislative sanction, the Territorial enabling act having been repealed before the holding of the referendum and the enactment of the first sales tax ordinance?

Appellant contends that since the 1951 referendum and ordinance were without legislative authority, both were void and the enactment, in 1953, of a new enabling statute, again requiring a referendum, conferred no authority upon the City Council of Palmer to enact a new sales tax ordinance, containing penal provisions, without another referendum. Accordingly, Ordinance No. 40 is void and neither the Municipal Court nor the District Court had jurisdiction to try and sentence the appellant herein. Hence the District Court erred in denying the motions for acquittal and entering judgment and sentence of fine and imprisonment thereon. The District Court also erred in refusing to pass on the validity of such ordinance on the theory that defendant (appellant herein) was "estopped" to deny the validity of the ordinance. (*sic!* R., pp. 50, 51, 57).

2. Is the judgment of conviction invalid upon the face of the record because of a fatal variance with the complaint or information upon which it is based and because it is wholly unsupported by the stipulated (and only) facts in this case?

Appellant contends that he was accused in the information (styled a "complaint" under local practice) of *wilful failure to file a sales tax return for August 1956*, yet the memorandum opinion, filed *in lieu* of findings of fact and conclusions of law in support of the judgment, as well as the stipulated (and *only*) facts of the case, show that appellant *did* file such return and paid over the tax moneys collected, albeit tardily. Moreover, there is *no evidence whatsoever* in the record indicating that appellant acted wilfully or intentionally. Hence, the District Court erred in finding appellant "guilty as charged" (R., p. 54) and entering judgment thereon.

3. Was appellant deprived of "due process" of law when the District Court, after hearing a motion for judgment of acquittal, submitted upon stipulated facts, denied the same and proceeded, summarily, to find appellant guilty, pronounce sentence and enter judgment, without further trial or hearing of any kind, and without the aid of a jury?

Appellant contends that when the District Court had ruled on the motion to acquit, based upon stipulated facts, such stipulation had fully performed its purpose and appellant, not having waived the same, was entitled to trial by jury under the provisions of Secs. 66-12-1 and 2, ACLA 1949. Hence the District Court erred in proceeding, summarily, to find appellant guilty, pronounce sentence of fine and imprisonment and enter judgment thereon.

ARGUMENT.

I.

SALES TAX ORDINANCE NO. 40 OF THE CITY OF PALMER, ALASKA, HAVING BEEN ENACTED WITHOUT REFERENDUM, AFTER REPEAL OF A PRIOR, SIMILAR ORDINANCE (NO. 10), BASED UPON A REFERENDUM HELD WITHOUT LEGISLATIVE SANCTION, IS VOID, BECAUSE THE 1949 TERRITORIAL ENABLING ACT AUTHORIZING CITIES TO LEVY A SALES TAX WAS REPEALED IN 1951 BEFORE THE HOLDING OF THE REFERENDUM AND THE ENACTMENT OF THE FIRST SALES TAX ORDINANCE AND THE NEW (1953) ENABLING ACT, UPON WHICH SUCH ORDINANCE NO. 40 WAS BASED, AGAIN REQUIRED THE HOLDING OF A REFERENDUM, WHICH WAS NOT DONE.

Municipal corporations of the Territory of Alaska have only such powers of government as are expressly granted to them, or such as are necessary to carry into effect those that are granted. Where there is doubt as to whether or not such a municipality has been granted a power which it claims, such doubt is to be resolved against the use of such power by the municipality.

Valentine v. Robertson, (CCA 9th, 1924), 300 F. 521;

In re Bruno Munro, (1901), 1 Alaska 279;

Ketchikan Co. v. Citizens' Co., (1903), 2 Alaska 120, 128, 129;

Conrad v. Miller, (1905), 2 Alaska 433, 437;

Fairbanks v. Independent Meat Market, (1910), 4 Alaska 147;

Ballaine v. Seward, (1917), 5 Alaska 734, 739;

Cochran v. Nome, (1944), 10 Alaska 425, 434, 435;

See also, as to municipalities generally, the following:

Los Angeles v. Gurdane, (CCA 9th, 1932), 59 F.2d 161, 165;

Milwaukee v. Meyer, (Wis., 1929), 224 N.W. 106, 108;

Earusso v. East Hanover, (N.J., 1936), 182 Atl. 617;

Ex parte Davis, (Okla., 1941), 114 P.2d 186.

Accordingly, any authority which the City of Palmer, a city of the first class and a municipal corporation of the Territory of Alaska, ever possessed, to provide, by ordinance, for the levy and collection of consumer's sales taxes and to provide for enforcement thereof by criminal sanctions, must be found in specific delegations from the Congress or the Territorial Legislature. Prior to the enactment of Chapter 33, SLA 1949, none of the cities in Alaska possessed such powers. The enactment of the 1949 statute (Appendix A), conferred this right but provided as a condition precedent "that the consent of the qualified voters of the municipality is first obtained through a referendum vote at a general or special election * * *".

Based upon this authority, enacted into law over considerable opposition, various Alaskan municipalities proceeded to hold sales tax referenda and to enact sales tax ordinances. It is a matter of public record that there existed a large body of public opinion in the Territory of Alaska, dissatisfied with the law and claiming that its provisions led to irresponsibility and waste in municipal government. It is

conjectural whether or not this public pressure led to the enactment, in the next succeeding session of the territorial legislature, of Chapter 47, SLA 1951 (Appendix B). This act, nonetheless, specifically purported to amend the 1949 statute (Appendix A) “*to read as follows*”: (there follows re-enactment—with certain changes—of clause (a), which provides for a general tax for school and municipal purposes, but clause (b), which had been added by the 1949 statute and which contained the sales tax authority is eliminated). A very strong indication of the legislative intent is found, moreover, in the fact that clause (a) of subsection Ninth was concurrently amended so as to *increase* the maximum level of the general property tax to not to exceed *three* percentum of the assessed valuation, from the two percent limit contained in the 1949 statute, presumably to compensate for the revenue loss occasioned by the implied repeal of the sales tax authority.

It is also a matter of public record that considerable confusion resulted from this method of accomplishing repeal of the sales tax and that many Alaskan cities continued to collect sales taxes in the belief that no repeal had been intended. This controversy was again carried to the 1953 Session of the Territorial Legislature, where the conflict was resolved in favor of strong municipal importuning for re-enactment of sales tax authority, resulting in the passage of Chapter 121 SLA 1953 (Appendix C). Recognizing moreover, that those cities which had continued to collect sales taxes would be financially embarrassed if they were required to refund the same, the legislature

enacted Section 2 of the Chapter just cited, which provided that “all *sales taxes heretofore levied and collected* by municipalities within the Territory of Alaska, *pursuant to ordinances which were valid at the time of their enactment*, are hereby ratified and confirmed.” (Italics supplied).

This very limited validation clause, which purports to validate only the interim levy and collection of sales taxes pursuant to ordinances *valid at the time of their enactment*, is sharply contrasted with another validation clause, enacted at the same session of the legislature, *before* the last mentioned Chapter, to take care of a similar situation affecting cities of the *second* class. In that case, because of confusion created by ambiguous statutory language, the councils of some of the cities of the second class of the Territory of Alaska had assumed that the 1949 enabling statute had conferred upon them, as well as upon cities of the first class, authority to enact sales tax ordinances and to levy sales taxes pursuant thereto. They proceeded to do so and when their authority was challenged, appealed to the 1953 legislature, which came to the rescue by enacting chapter 92, SLA 1953 (approved March 28, 1953), conferring authority to levy sales taxes upon cities of the second class. It contains the following validation clause:

“*All sales tax ordinances, otherwise valid, which have been enacted by cities of the second class prior to the effective date of the act under the provisions of subsection (b) of Chapter 38, Session Laws of Alaska 1949, are hereby validated and confirmed. * * **” (Italics supplied).

When the two statutes just cited—which are *in pari materia*—are read together, the conclusion is inescapable that the 1953 legislature intended to accomplish the following things:

1. To restore to cities of the first class the power to levy consumers' sales taxes.

2. To validate and confirm the collection of sales taxes made by cities of the first class during the interim following the repeal, but only pursuant to ordinances "valid at the time of their enactment" (*i.e.*, enacted pursuant to referendum and prior to repeal), so as to prevent the necessity of refunds in those cases.⁴

3. To give cities of the second class authority, for the first time, to levy consumers' sales taxes; and

4. To validate, retroactively, sales tax ordinances of cities of the second class, otherwise valid (*i.e.*, duly enacted pursuant to referendum and with proper observance of procedural requirements) prior to the effective date of the enabling act, in mistaken reliance upon the statute conferring such authority upon cities of the first class.

Clearly absent, and indeed negated, is the indication of any intent to validate sales tax *ordinances* enacted by cities of the *first* class during the period of repeal, from June 21, 1951 to March 30, 1953. Yet it was precisely in this period, namely, on July

⁴Indicating recognition of the rule that repeal of the enabling act, without saving clause, carries with it all ordinances enacted thereunder (*vide infra*).

10, 1951, that the Palmer sales tax referendum was held, and on August 8, 1951, that the Palmer sales tax ordinance (No. 10) was passed. Undoubtedly, it was in clear recognition of the invalidity of this ordinance, that the City Council of Palmer, on June 1, 1954, repealed the invalid Ordinance No. 10 and attempted to enact a new sales tax ordinance, based upon the 1953 statute. No compliance, however, was made with the new statute's requirement that a referendum be held, but reliance was had upon the old, invalid (because not sanctioned by law) referendum of 1951. It is not unreasonable to presume that one of the reasons was a considerable doubt in the mind of the city fathers whether such a referendum would again pass, after the citizenry had several years experience with the administration of the Palmer sales tax measure. Whatever the reasons, however, compliance was not had with the condition precedent expressly stipulated in the 1953 enabling act and since the validating clause of that statute makes it perfectly clear that the legislature did not intend to revive the old (1949) statute, the attempt to "tack" the invalid referendum unto the enactment of the new ordinance clearly makes the latter invalid, as lacking the consent of the voters which the statute demands before the authority may be exercised.⁵

⁵If the 1953 act had merely reinstated the language repealed in 1951, it might be argued perhaps that the consent given by the 1951 referendum was carried forward. However, as has been shown, the 1953 sales tax authority contained important changes, such as the inclusion of rents (see footnote 1, on page 4, *supra*).

It is, of course, an elementary proposition of municipal law, that where a general statute prescribes the form and manner of adopting ordinances, compliance with the statutory requirements is essential to the validity of the ordinance.

Genkinger v. City of New Castle, (Pa., 1951), 84 Atl. 2d 303, 304;

Jack v. Torrant, (Conn., 1950), 71 Atl. 2d 705, 708 (failure to comply with procedural requirement of enabling act);

Liberty Nat'l Bank of Chicago v. Metrick, (Ill., 1951), 102 N.E. 2d 308, 310 (ordinance held a nullity where non-compliance with style requirement apparent on its face);

Bruno v. Shrewsbury, (N.J.L., 1949), 65 Atl. 2d 131;

Reimer v. Holyoke, (Colo., 1933), 27 P. 2d 1032, 1034 (failure to conform to required format);

City of Glens Falls v. Standard Oil Co., (N.Y. Misc., 1926), 215 N.Y.S. 354;

Sessinghaus v. Central Paving & Construction Co., (Mo., 1922), 296 S.W. 1034 (compliance with preliminary steps before enactment, as required by charter, held: jurisdictional);

Tennent v. Seattle, (Wash., 1914), 145 P. 83 (failure to comply with charter requirements as to enactment procedure);

Elliott v. Monongahela City, (Pa., 1911), 79 Atl. 144 (failure to comply with prescribed enactment procedures).

Accord:

Cooper v. Valley Head, (Ala., 1924), 101 So. 874, 877 (failure to comply with required procedure; ordinance upheld on other grounds).

Since Ordinance No. 40 of the City of Palmer thus obviously does not comply with the express requirements of the 1953 enabling act, it must be deemed invalid, unless it may be upheld on either one of two possible theories. First, that the 1951 statute (Appendix B) did not repeal the 1949 enabling act (Appendix A) or, second, that the 1953 act (Appendix C) revived and validated, retroactively, the authority granted in 1949 and repealed in 1951, thus saving the 1951 referendum and ordinance of the City of Palmer.

Appellant contends that since this is a penal ordinance and since he is to be deprived of liberty and property thereunder, the city is not entitled to the various liberal presumptions of validity and rules of construction often accorded to remedial or beneficial municipal legislation. It is, of course, axiomatic that penal ordinances, like other penal laws, are strictly construed and that all doubts are resolved in favor of the defendant as against the public authority.⁶

As a municipal ordinance draws its authority from a statutory enactment, the withdrawal of the author-

⁶See, e.g., annotation in 17 Ann. Cas. 212 (and cases there cited); and see, generally, as to penal statutes: *McBoyle v. United States*, (1931), 285 U.S. 25, 51 S.Ct. 340, 75 L.ed. 816; *Kordel v. United States*, (1948), 335 U.S. 345, 69 S.Ct. 106, 93 L.ed. 52; *Smitkin v. United States*, (CCA 7th, 1920), 265 F. 489, 494.

ity of the enactment by specific provision or by implication from subsequent legislation upon the subject matter operates to repeal any ordinance which was dependent upon the repealed statute for its existence. Likewise, an ordinance which precedes the enactment of a conflicting statute is repealed upon the promulgation of that statute. It follows, without need for extended argument, that an ordinance passed after repeal of the enabling act must be a nullity.

1 McQuillin on Municipal Corporations, (3rd ed.), Sec. 21.43;

Richards v. Wheeler, (Cal. App., 1935), 51 P. 2d 436, 439;

Luse v. Dallas, (Tex. App., 1939), 131 S.W. 2d 1079, 1084.

Under the common law rules of construction and interpretation, the repeal of a penal statute operates to efface the act from the statute books as though it had never existed. The repeal operates to terminate any prosecution which has not proceeded to a final judgment and grants immunity from prosecution or indictment under the act for offenses committed while the act was in operative existence.

See, e.g., *Norris v. Crocker*, (1871), 13 How. (U.S.) 429, 438, 14 L.ed. 210, 213;

Keller v. State, (Md., 1858), 71 Am. Dec. 596.

While many jurisdictions, including Alaska, have enacted general saving statutes with the express purpose of achieving a continuance of the repealed statute in respect to past activity and pending legal actions, municipal ordinances are not within the pur-

view of general saving statutes. Therefore the repeal of an ordinance is a bar to a prosecution under it.⁷

Moore v. Ashton, (Ida., 1922), 211 P. 1082, 32 ALR 1512;

Leach v. Kenyon, (N.Y., 1933), 261 N.Y.S. 676;

Rutherford v. Swink, (Tenn., 1895), 35 S.W. 554.

We come now to consider the effect of the amendatory act of 1951 (Appendix B). Because it is defined as an act that changes an existing statute, the courts have declared that the mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one. Therefore any material change in the language of the original act is presumed to indicate a change in legal rights.

People v. Weitzell, (Cal., 1927), 255 P. 792, 52 ALR 811;

McLaren v. State, (Tex., 1917), 199 S.W. 811, 812.

To determine what effect or defects in the original act the legislature intended to remedy, the original act must be compared with the amendment. Those provisions of the original act which are in irreconcilable conflict with the provisions of the amendatory act are impliedly repealed. When the amendatory act purports to set out the original act or sections *as amended*, all matter in the act or section that is

⁷Note that the repealed statute carried no penalty provisions. Such penal sanctions as were provided were contained in the municipal ordinance.

omitted in the amendment is considered repealed. The intent of the legislature to set out the original act or section as amended (and to omit portions not repeated), is most commonly indicated by a statement in the amendatory act that the original law is amended "to read as follows". This is the language used in the amendatory statute involved in the case at bar. By its use, the legislature has declared that the new statute is a substitute for the original act. Only those provisions of the original act which are repeated in the amendment are retained.

United States v. One Icebox, (DC ND Ill., 1930), 37 F. 2d 120, 123;

Mitchell v. Walden Motor Co., (Ala., 1937), 177 So. 151, 153;

Brockman v. Board of Directors, (Ark., 1934), 66 S.W. 2d 619;

Ashton Motor Car Co., v. Mannion, (Conn., 1918), 103 Atl. 655;

Simborski v. Wheeler, (Conn. 1936), 183 Atl. 688, 690;

State ex rel. McQuaid v. Duval County, (Fla., 1887), 3 So. 193, 204;

Chicago v. Jewish Consumptives' Relief Society, (Ill., 1926), 154 N.E. 117, 118;

Smith v. State, (Ind., 1924), 144 N.E. 471, 472;

State ex rel. Nicely v. Wildey, (Ind., 1935), 197 N.E. 844, 846;

Grieb v. Jefferson County Fiscal Court, (Ky., 1933), 61 S.W. 2d 285, 286;

People v. Lowell, (Mich., 1930), 230 N.W. 202;

- Mannheimer Bros. v. Kansas City Casualty & Surety Co.*, (Minn., 1920), 180 N.W. 229, 230;
- Bell v. State*, (Miss., 1918), 79 So. 85;
- Belfast Inv. Co. v. Curry*, (Mo., 1915), 175 S.W. 201, 204, 205;
- Continental Oil Co., v. Montana Concrete Co.*, (Mont., 1922), 207 P. 116, 118;
- McDermott v. Nassau Electric R. Co.*, (N.Y., 1895), 32 N.Y.S. 884;
- State ex rel. Durr v. Spiegel*, (Ohio, 1914), 109 N.E. 523;
- Texas Farm Bureau Cotton Ass'n v. Lennox*, (Tex., 1927), 296 S.W. 325, 327;
- Bierer v. Blurock*, (Wash., 1894), 36 P. 975, 976;
- Thom v. Sensenbrenner*, (Wis., 1933), 247 N. W. 870, 871;
- Rouw Co., v. Crivella*, (CCA 8th, 1939), 105 F. 2d 434, 437.

Thus, when the Territorial Legislature enacted the 1951 statute (Appendix B), stating specifically that it was amending the 1949 statute (Appendix A) so as "to read as follows" and omitted subsection (b) which contained the municipal sales tax authority, the latter, under the rule of the cases just cited, was repealed by clear implication.⁸

⁸If there was ever any doubt as to the legislative intent to effect a repeal by the 1951 amendment (Appendix B), such doubt was resolved when the 1953 Session enacted the validation clause set forth at page 5, *supra*. Had there been no repeal, no validation was necessary.

Some courts have said that repeals by implication are not favored and that there is a presumption of a contrary legislative intendment. This view has been criticized by Mr. J. G. Sutherland, the eminent authority on the law of statutes and statutory construction, who writes in his standard treatise, as follows:

“Legislation may serve a dual purpose, either to restate or repeal the existing law. With regard to existing and older legislation it is, perhaps, not uncommon for new legislation to have as its principal or sole purpose the restatement of existing law for purposes of clarity and uniformity. But unquestionably, the motive behind the great bulk of new legislation is to change in one way or another, the existing law, including both common law and legislation. The exact extent to which existing legislation is repealed by later legislation, in the absence of provision expressly specifying the intended repeal, is subject to extreme variations that are dependent upon the subject matter of the new statute.

“The rule that a repeal by implication will not be presumed places the emphasis upon the older, and, perhaps, more firmly established policy to be found in previous legislation. It must be conceded that an understanding of the pre-existing legislation provides one of the most valuable aids in determining the purposes of the new legislation, and in adapting the new law into the existing scheme of jurisprudence under the doctrine that statutes will be interpreted *in pari materia*.

“But the underlying theory behind the legislative process is that it is through the legislature and Congress that the current public demands

resulting from changing social, economic and political conditions are enabled to find expression.

“Since it is from the subject matter of new legislation that the extent of a repeal is to be sought, it is submitted that the presumption against implied repeal often serves as a cumbersome method for determining legislative intent, which in many cases produces unsatisfactory results. Instead, the emphasis in the first instance belongs upon the purposes and objects behind the expression of the new statute with fair consideration to surrounding conditions and former legislation.”

1 Sutherland on Statutes and Statutory Construction, (3rd ed.), Sec. 2016 (and cases there cited).

It is submitted that, applying these tests to the legislation with which the case at bar is concerned, it is quite apparent that the legislature in 1951, giving way to public criticism of the controversial municipal sales tax statute, attempted to revamp that portion of the general statute enumerating the powers of cities of the first class which deals with the power to tax, by dropping from it the portion relating to authority to levy consumers' sales taxes, which it had so recently added, and increasing, as a compensatory measure, the statutory limit upon *ad valorem* property taxes which such cities were empowered to levy. To resolve any doubt, moreover, enactment of the validation section of the 1953 statute (Appendix C), gave clear legislative recognition to the fact that the 1951 amendment (Appendix B) did indeed constitute

a repeal of the sales tax authority. Otherwise the validation clause would be meaningless.⁹

We have thus seen that the authority granted (in 1949) to cities of the first class in the Territory of Alaska to levy sales taxes (based upon certain conditions), was indeed repealed by the next succeeding legislature in 1951. What then was the effect of its re-enactment in 1953?

Generally speaking, the re-enactment of a statute is a continuation of the law as it existed prior to the re-enactment insofar as the original provisions are repeated without change in the re-enactment. Consequently, an intermediate statute which has been superimposed upon the original enactment as a modification of its provisions is likewise not repealed by a re-enactment of the original statute, but is construed as being continued in force to modify the re-enacted statute in the same manner that it did the original enactment. However, this immunity from repeal is extended only to those provisions of intermediate acts which are consistent with the re-enactment, and therefore, any provisions in the intermediate act which are inconsistent with the re-enactment are repealed.

See:

- 1 Sutherland on Statutes and Statutory Construction, (3rd ed.), Sec. 2036.

Here, however, the intermediate act repealed the original act and the re-enactment, therefore, effected

⁹The presumption, of course, is in favor of a meaningful, as opposed to a futile or superfluous legislative act. See: 2 Sutherland on Statutes and Statutory Construction, (3rd ed.), Sec. 4510 (and cases there cited).

a continuation (with modifications) of clause (a) of subsection Ninth—relating to the *general* taxing powers of municipal corporations—as contained in both the 1949 and 1951 statutes. As to clause (b), however, which related to the sales tax powers, that proviso had been wiped off the books in 1951, and hence to that extent the 1953 act repealed the 1951 statute and created a new statutory power of prospective application. Needless to say, to the extent that it might be considered to have revived the penal provisions of any ordinance under which a criminal prosecution might be brought, it was *required* to be of *prospective* rather than retroactive application, to avoid the fatal constitutional defect of an *ex post facto* criminal statute.

Constitution of the United States, Article I,
Secs. 9 and 10;

Calder v. Bull, (1798), 3 U.S. 386, 1 L. ed. 648;

United States v. Stafoff, (1923), 260 U.S. 477,
480, 43 S. Ct. 197, 67 L. ed. 358;

State v. Williams, (N.C., 1887), 2 S.E. 55, 56;

Moore v. State, (N.J., 1881), 39 Am. Rep. 558.

In the present case, moreover, the legislature, in enacting the validation clause cited above (at p. 5 of this brief) clearly indicated its intent that the enabling authority which conferred upon municipalities the right to enact such ordinances was intended to be prospective only from the date of re-enactment, by singling out for validation only those “sales taxes heretofore levied and collected by municipalities * * * pursuant to ordinances which were valid at the time of their enactment”. The strikingly contrasting man-

ner of validating the *enactment of sales tax ordinances* by cities of the second class, effected by the same session of the legislature, has been pointed out before (*vide supra*, at p. 12 of this brief).

Clearly, therefore, had the legislature intended to validate *ordinances enacted* (as distinguished from sales taxes collected) by cities of the first class during the interim of the repeal, it would have used the language employed by it in the statute just previously enacted with reference to cities of the second class. That it did *not* do so, indicates a clear intent to the contrary, and if there were any ambiguity involved, it must obviously be resolved in favor of a defendant in a criminal prosecution who is entitled to fair warning, in advance, of the scope and effect of a penal statute. Moreover, it is well settled that an ordinance void under a statute existing at the time of its enactment is not validated by an amendment of the statute so that the ordinance might be validly enacted under the amended law.

McGillic v. Corby, (Mont., 1908), 95 P. 1063, 1064, 17 LRA (NS) 1263.

Also, it has been held that a statute passed subsequent to the enactment of an invalid ordinance purporting to empower the common council to enforce any regulation, contract, or law theretofore made upon the subject with which the ordinance deals, but not naming the particular ordinance in question, is not in itself a confirmation of the ordinance so as to validate it.

Chicago v. Rumpff, (Ill., 1867), 92 Am. Dec. 196, 202.

Of course, the law here in question does not purport to go nearly that far, but on the contrary specifies quite clearly a far more limited validation, applicable to the fruits of those ordinances only which were enacted prior to repeal (*vide supra*).

Admittedly, there are here presented extremely nice problems of statutory interpretation, which might be considered as involving a close question, but for the criminal nature of the proceedings and the overriding considerations, firmly embedded in the Anglo-American system of jurisprudence, of protecting the accused and resolving such doubts in his favor.

The trial judge below, however, was not troubled by such problems of statutory construction and interpretation. He sliced through the Gordian knot in one deft stroke, by application of the entirely novel theory that a person subject to criminal prosecution for alleged failure to make a tax return, is "estopped" from questioning the validity or constitutionality of the penal statute under which he is to be jailed, if he has made partial or imperfect compliance, such as here, by collecting the tax and making a tardy return and payment. Apparently, this unorthodox doctrine was suggested to the trial court below by the prosecuting attorney who contended, successfully, that this was "the real issue" in this case.¹⁰

¹⁰"The Court: Mr. Hagen, will you please come forward with your counsel. Motion for judgment of acquittal is denied. I feel that Mr. Plummer has pointed out the real issue, he felt that if Mr. Hagen wanted to test the constitutionality of the statute he would have refused to have collected everything (*sic*); having once collected it I feel you are not in position (*sic*) to raise that issue at this time." (R., p. 57).

The following portion of the memorandum opinion filed by the trial court below, summarizes this theory and at the same time epitomizes the nature and extent of the error into which the trial judge appears to have fallen:

“I am of the opinion and hereby find that it is not necessary for the court to determine the validity of the original or amendatory statutes or the ordinances here in question, for the reason that the defendant collected said taxes in question and, therefore, now is precluded from challenging the constitutionality of such statutes. When the defendant collected the taxes he became the agent of the city of Palmer and as such is obligated to account to the city, as principal, for the amount thereof, and as a collector, he cannot now deny the right of his principal to receive such, on the ground that the tax was illegally levied. This is a well established principle of the law (citations). The same result is often justified on grounds of estoppel (citation), constructive trust or other equitable grounds (citations). * * *” (R., pp. 50, 51).

An examination of the authorities cited by the District Judge in this opinion quickly shows that the foregoing misstatement of the law is due to a confusion of the rules applicable to the jurisdictional issue of the validity of a statute or ordinance under which a criminal prosecution is brought, with certain equitable principles which form the basis of denying certain defenses in civil cases. Thus, apart from a reference to a text on the law of agency, the relevancy of which is not readily apparent, the opinion relies on

these cases (R., p. 51): *Village of Olean v. King*, (N.Y., 1889), 22 N.E. 559; *Collins v. Tillou*, (Conn., 1857), 68 Am. Dec. 398; and *Murdock v. Cincinnati*, (CC SD Ohio, 1891), 44 F. 726.

If the author of the opinion below had chanced to read these cases, or even their syllabus, he might have been startled to discover the following:

Village of Olean v. King, (*supra*), was a civil action against an official tax collector and the sureties on his bond. The collector had failed to pay over taxes which he had received in his official capacity and when sued by the city resisted the action on the ground, among others, that the tax was invalid and therefore should not have been levied in the first place. The court held that

“While a tax collector may decline to proceed in the collection of a tax illegally levied, as any person may refuse to recognize any illegal authority, or to obey an unconstitutional law, *he may do so only for his own protection*. Having collected a tax, he cannot then question the right of the proper authority to receive it, but must pay it over. * * * He can constitute himself judge of the validity of the tax *for his own protection only*. * * *” (Italics supplied).

loc. cit., at p. 561.

Collins v. Tillou (*supra*), involves an appeal from a judgment in favor of a claimant against the insolvent estate of his agent, to whom he had given a deed to land previously forfeited for non-payment of taxes, for the purpose of enabling such agent, in behalf of his principal, to seek the recovery of such

land on the ground that the tax sale was invalid. The agent compromised the claim to the land with the purchaser under the tax sale and thereafter failed to account to his principal for the proceeds. On appeal from a judgment in favor of the plaintiff it was contended by the representatives of the agent, since deceased, that as the principal did not have good title when he conveyed to the agent, he should not be allowed to recover. It was *held, inter alia*,¹¹ that the agent cannot now deny the title of his principal. The court said:

“He was willing to accept the agency and sell the land; and now for the agent *to retain the money* on such ground is unconscionable and in violation of long established principles of law.” (Italics supplied).

loc. cit., at p. 399.

Finally, *Murdock v. Cincinnati*, (*supra*), involved an action to enjoin a municipality from collecting or enforcing certain assessments for street improvements. The plaintiff claimed that while assessments were authorized by law, the law was void as wanting in “due process of law”, because there was no notice or opportunity to be heard. It was *held* that since the plaintiff in this case had himself petitioned the municipality to make the improvements and to assess his property therefor, he was thereafter estopped from impeaching or denying the assessment or at least he may be deemed to have waived the procedural requirements of notice, the court saying “proceedings,

¹¹The case turns mainly on a question of parol evidence.

whether *ex parte* or adversary, which result in the taking or depriving a person of his private property, are not wanting in 'due process of law' if such person has, in advance, consented to the same. His request that they should be had is the equivalent of notice, or a waiver thereof."

loc. cit., at p. 728.

It was further held in that case that a proceeding which was then pending in the state courts on the non-federal aspects of the case would afford the complainant the opportunity to be heard to which he claimed to be entitled.

Obviously these cases, upon the purported authority of which the trial court saw fit to deprive the appellant of his liberty are not even remotely related to the issues presented by the case at bar. This is not a case involving the right of this appellant to retain monies collected by him for the municipality under a claim that it is not entitled to receive them by virtue of the invalidity of the enabling ordinance. Here the defendant has paid over the money and is raising the question of the validity of the ordinance as a defense to a criminal prosecution for its alleged violation.¹² In this context, the issue of whether the ordinance is valid or not is not collateral, but is *jurisdictional*. Therefore the defendant can neither be deemed to be estopped from raising the point nor to have waived the defense or to have consented to the exercise of

¹²The point that his actions in collecting and paying over the tax, under pain of criminal sanctions, do not constitute any "waiver" of his rights, or "consent" to incarceration, seems too obvious to be belabored.

criminal jurisdiction under the void statute. Jurisdiction of the subject matter of a crime is derived from the law. It can never be acquired solely by the consent of the accused. Objection that the court has not jurisdiction of the subject matter may be made at any stage of the proceedings, and the right to make such objection is never waived.

See:

Annotation in 25 Am. Rep. 540, 541;

and see also:

Kelly v. Meyers, (Ore., 1928), 263 P. 903, 905;
56 ALR 661.

It is elementary that an invalid or unconstitutional statute or law is no law at all and that any judgment of conviction had pursuant to such statute is void as were the proceedings which led to it.

Osborn v. Bank of U. S., (1824), 22 U.S. 739,
6 L. ed. 204;

Daniels v. Tearney, (1880), 102 U.S. 415, 26
L. ed. 187;

Rodgers v. Mabelvale Ext. Rd. Imp. Dist. No. 5,
(CCA 8th, 1939), 103 F. 2d 844, 846;

In re Rahrer, (CC Kan., 1890), 43 F. 556, 558,
559;

Hubbard v. Lowe, (DC N.Y. 1915), 226 F. 135,
141.

II.

THE JUDGMENT OF CONVICTION HERE APPEALED FROM IS INVALID UPON THE FACE OF THE RECORD, BECAUSE OF A FATAL VARIANCE WITH THE COMPLAINT OR INFORMATION UPON WHICH IT IS BASED AND BECAUSE IT IS WHOLLY UNSUPPORTED BY THE STIPULATED (AND ONLY) FACTS IN THIS CASE.

The information (styled a "complaint" under local practice) in this case accused the appellant of a misdemeanor in these words: "The said Alfred V. Hagen, d/b/a Valley Theater in the City of Palmer, Alaska, and within the jurisdiction of this Court, did, wilfully, fail to file a sales tax return for retail sales and service (*sic*) made and performed during the month of August, 1956, in violation of Section No. 6, Ordinance No. 40, and contrary to said Ordinance of the said City of Palmer, * * *" (R., pp. 5, 6).

The record shows that not only is there no evidence whatsoever of any wilful or intentional failure to file such return, but on the contrary, the stipulated (and only) facts show that indeed such a return was made and the money paid over, albeit tardily, on November 15, 1956, the date on which the complaint was filed and (presumably) before it and the warrant of arrest issued thereon were served (R., pp. 4, 15, 49). The memorandum opinion, filed herein in lieu of findings of fact and conclusions of law adopts these facts. Yet, the judgment recites that the defendant (appellant herein) "has been *convicted of the offense as charged in the complaint*" and that "it is adjudged that the defendant is *guilty as charged*" (R., p. 54; italics supplied).

Giving these words their plain and ordinary meaning, it follows that it was the judgment of the trial court that the defendant was convicted and found guilty of "wilfully failing to file a sales tax return for retail sales and services made and performed during the month of August, 1956". Obviously, the record not only fails to support such a judgment, but patently contradicts it.

The law on the subject admits of little argument. The indictment or information in a criminal prosecution necessarily confines the government to the charge made against the defendant, in order that the defendant shall know, as the Constitution provides, "the nature of the accusation against him."¹³ The defendant can be tried only on the charge contained in the indictment or information and not for any other offense.

Clyatt v. United States, (1904), 197 U.S. 207, 222, 25 S. Ct. 429, 49 L. ed. 726, 731;

Wright v. People, (Colo., 1939), 91 P. 2d 499, 502, 123 ALR 474;

State v. Coomer, (Vt., 1933), 163 Atl. 585, 587, 94 ALR 1038;

And see also: Annotation in 24 ALR 1142.

Likewise, a person cannot be convicted of an entirely different offense from that charged or necessarily

¹³Article VI of the Amendments to the Constitution of the United States.

included within the terms of the indictment or information.

The Hoppet v. United States, (1813), 7 Cransh. 389, 394, 3 L. ed. 380, 382 (*per* Marshall, Ch. J);

People v. Grogan, (N.Y., 1932), 183 N.E. 273, 275, 277, 86 ALR 1266.

It is thus quite apparent upon the face of the record, that a fatal variance exists between the complaint or information and the judgment on the one hand, and the facts as stipulated and found by the court on the other. For this reason alone the judgment should be set aside.

III.

WHEN THE DISTRICT COURT, AFTER HEARING A MOTION FOR JUDGMENT OF ACQUITTAL, SUBMITTED UPON STIPULATED FACTS, DENIED THE SAME AND THEREAFTER PROCEEDED, SUMMARILY, TO FIND APPELLANT GUILTY, PRONOUNCE SENTENCE AND ENTER JUDGMENT, WITHOUT FURTHER TRIAL OR HEARING OF ANY KIND, AND WITHOUT THE AID OF A JURY, CONTRARY TO THE MANDATORY PROVISIONS OF ALASKA LAW, THE APPELLANT WAS THEREBY DEPRIVED OF "DUE PROCESS" OF LAW IN A CRIMINAL PROCEEDING IN WHICH HIS LIBERTY AND PROPERTY ARE IN JEOPARDY.

Section 16-1-70, ACLA 1949, provides for appeals to the District Court for the District of Alaska from judgments of the municipal courts of cities of the first class in the Territory of Alaska. The procedure followed upon such appeal is outlined in Sections 69-6-1 through 11, ACLA 1949. Accordingly, the case is

tried *de novo* as if originally initiated in the District Court. The trial *de novo* in that court is an exercise of original jurisdiction.

United States v. Smith, (1922), 6 Alaska 472, 475;

Application of Jorge, (1945), 10 Alaska 633, 639.

While there is no provision for jury trials in the municipal courts of the Territory of Alaska, the right to a trial by jury is expressly and unequivocally preserved in all criminal cases tried in the District Court, by Sections 66-13-1 and 2, ACLA 1949, which apply to all proceedings for the punishment and prevention of crimes in the Territory of Alaska, except as superseded by the Federal Rules of Criminal Procedure. The sections of the Territorial Code, just cited, read as follows:

“Sec. 66-13-1. When issues of fact arise. That an issue of fact arises—

1. Upon a plea of not guilty; or,
2. Upon a plea of former conviction or acquittal of the same crime.

“Sec. 66-13-2. How issues tried. That an issue of law *must be tried* by the court, and an issue of fact *by jury*, of the political division in which the action is triable.” (Italics supplied.)

While it may be contended that the crime in question is a petty offense within the meaning of applicable federal statutes and rules of procedure, yet even under Rule 23(a) of the Federal Rules of Criminal

Procedure it has been held that all offenses, even petty offenses, must be tried by a jury, in the absence of statutory provisions for trial without a jury. *A fortiori*, a jury trial is mandatory where statutory provisions require it in all criminal prosecutions, such as is the case under the Territorial statutes cited above.

United States v. Great Eastern Lines, (DC ED Va., 1950), 89 F. Supp. 839.

It is clear, therefore, that trial of the issues of fact in the present case by a jury was mandatory in view of the use of the word "must" in the statute cited above.¹⁴

On the surface, it might appear in this case as though, by inference at least, appellant waived the right to trial by jury when he stipulated to certain facts for the purpose of submitting an issue of law to the District Court upon consideration of the motion for judgment of acquittal. However, in doing so, appellant followed the standard practice in said court of limiting such stipulations of facts strictly to the de-

¹⁴The Territorial statute relied on, *i.e.*, Secs. 66-13-1 and 2, ACLA 1949, are part of the Code of Criminal Law and Procedure for the Territory of Alaska, enacted by the United States Congress on March 3, 1899 (13 Stat. 1253), which is applicable to all trials in courts of record in the Territory of Alaska. Separate provisions have been enacted for inferior courts by Title 69 of the Code, which is a recompilation of the Chapter entitled "Of Miscellaneous Provisions in Relations to Criminal Proceedings in Justice's Courts" which appear in the 1913 Code of Laws of Alaska. These latter provisions have been incorporated, in part, into the proceedings applicable to municipal magistrates, by virtue of statutory cross-references.

termination of the pending motion. If the motion is denied or held *sub curia*, the case then proceeds to trial in the ordinary course.¹⁵

Obviously, in the present case, the court did not have before it sufficient facts to make a determination or to support the one which resulted. It should be equally obvious, that waiver of such a fundamental constitutional right as the right to trial by jury must be accomplished by an affirmative act, not by inference. In the present case no opportunity was given the appellant to do anything, but to submit himself to summary verdict, sentence and judgment, as revealed by the record (*vide supra*). Such a procedure, appellant submits, is not consistent with "due process of law" as that term is interpreted in the federal courts.¹⁶

¹⁵See, e. g., *City of Anchorage v. John E. Anderson*, (DC 3d Div. Alaska, 1957), No. 3649 Cr., 17 Alaska (decided Sept. 19, 1957).

¹⁶See, e.g., Annotation in 75 L.ed. 200, 201; and cf. *In re Bruno Munro*, (*supra*, at p. 285).

CONCLUSION.

Based upon the reasons and the authorities stated above, appellant earnestly contends that the judgment of conviction below should be reversed and the cause remanded either with instructions to dismiss the complaint or to grant a trial *de novo* by jury.

Dated, San Francisco, California,
August 29, 1958.

Respectfully submitted,

EDGAR PAUL BOYKO,

Attorney for Appellant.

CHARLES E. TULIN,
BOYKO, TALBOT & TULIN,
Of Counsel.

(Appendices Follow.)

Appendices.



Appendix "A"

Chapter 38, SLA 1949

AN ACT to empower City Councils, pursuant to referendums, to levy sales taxes within their respective municipalities; and amending subsection Ninth of Sec. 16-1-35 ACLA 1949.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That subsection Ninth of Sec. 16-1-35 ACLA 1949 is hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy, and collect a general tax for school and municipal purposes not to exceed two per centum of the assessed valuation upon all real and personal property and to enforce the collection of such lien by foreclosure, levy, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder not exceeding Two Hundred Dollars (\$200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organization and all monies on deposit, shall be exempt from taxation. Provided, further, that if any

organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt. Provided further, that the laws excepting certain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation.

(b) **CONSUMER'S SALES TAX.** To levy and collect a consumer's sales tax not exceeding two percentum of the sales price on all retail sales and services made within the municipality; provided, that the consent of the qualified voters of the municipality is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot. If fifty-five percent (55%) or more of the votes cast in said referendum are in the affirmative, the council may thereafter enact such a tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the municipality. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and that although such method of taxation be established within a city, the

council may at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum.

Approved March 14, 1949.

Appendix "B"

Chapter 47, SLA 1951

AN ACT amending subsection Ninth of Sec. 16-1-35 ACLA 1949, as amended by Chapter 38 SLA 1949, pertaining to a general tax for school and municipal purposes.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That subsection Ninth of Sec. 16-1-35 ACLA 1949, as amended by Chapter 38 SLA 1949, is hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy, and collect a general tax for school and municipal purposes not to exceed three per centum of the assessed valuation upon all real and personal property, and to enforce the collection of such lien by foreclosure, levy, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder, not exceeding Two Hundred Dollars (\$200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized for business purposes, whose membership is composed entirely of veterans of any wars of the United States, or the property of the auxiliary of any such organization, and all monies on deposit, shall be exempt from taxation. Provided, further,

that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt. Provided further, that the laws excepting certain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation.

Approved March 21, 1951.

Appendix "C"

Chapter 121, SLA 1953

AN ACT to empower city councils to levy a general tax for school and municipal purposes, and to levy sales taxes within their respective municipalities; and amending subsection Ninth of Section 16-1-35 ACLA 1949, as amended by Chapter 47, Session Laws of Alaska, 1951, and validating sales taxes already collected, and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That subsection Ninth of Sec. 16-1-35* ACLA 1949 is hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy, and collect a general tax for school and municipal purposes not to exceed three per centum of the assessed valuation upon all real and personal property, and to enforce the collection of such lien by foreclosure, levy, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder, not exceeding Two Hundred Dollars (\$200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized

*Sec. 16-1-35, ACLA 1949: "Powers of Council. The council (of a city of the first class) shall have and exercise the following powers: * * * *Ninth:*

for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organization and all monies on deposit, shall be exempt from taxation. Provided, further, that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt. Provided further, that the laws excepting certain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation.

(b) **CONSUMER'S SALES TAX.** To levy and collect a consumer's sales tax not exceeding two per centum of the sales price on all retail sales, rents and services, made within the municipality; provided that the consent of the qualified voters is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot. If a majority of the votes cast in said referendum are in the affirmative, the council may thereafter enact such tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and

transmit same to the municipality. No such sales tax proposition shall be presented to the voters more than once in any twelve months. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and although such method of taxation be established within a city, the council may, at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum.

Section 2. All sales taxes heretofore levied and collected by municipalities within the Territory of Alaska, pursuant to ordinances which were valid at the time of their enactment, are hereby ratified and confirmed.

Section 3. (Emergency clause)

Approved March 30, 1953.

No. 15,926

IN THE

United States Court of Appeals
For the Ninth Circuit

ALFRED V. HAGEN,

Appellant,

vs.

CITY OF PALMER,

Appellee.

On Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF OF APPELLEE.

JOHN D. SHAW,

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P. O. Box 1826, Palmer, Alaska,

Attorney for Appellee.

FILE

DEC 17 1958

PAUL P. O'BRIEN, CL

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No. 15,926

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ALFRED V. HAGEN,

Appellant,

vs.

CITY OF PALMER,

Appellee.

On Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF OF APPELLEE.

JURISDICTIONAL STATEMENT.

The appellee concedes that the District Court for the Third Division, Territory of Alaska, has jurisdiction in this matter by virtue of the provisions of Sec. 16-1-70, Title 53, Chapter 2, and Title 69, Chapter 6, Alaska Compiled Laws Annotated, 1949, and 48 U.S.C. 101 and 193. The appellee also concedes that the United States Court of Appeals for the Ninth Circuit has jurisdiction on appeal as stated by appellant.

**STATEMENT OF THE CASE CONTROVERTING
THAT OF APPELLANT.**

The appellant has omitted one salient fact from his Statement of the Case, namely, that a formal trial was held in this matter by the District Court, beginning at 10:00 o'clock A.M., October 23, 1958 (R., pp. 11, 12) (Sup. R., pp. 63-69); also on pages 2 and 3 of appellant's brief appears the following gross misstatement of fact:

“In the District Court appellant filed his motion for judgment of acquittal and . . . submitted a stipulation of facts in support of said motion, for the purpose of raising the legal issue of the validity of the ordinance under which he was convicted in the magistrate's Court.” (Appellant's Brief, pp. 2, 3.)

Appellee presents the following statement as being in better accord with the record:

The appellant, Alfred V. Hagen, was convicted in the Municipal Magistrate's Court of the City of Palmer, Alaska, on December 4, 1956, of the petty offense of failure to file his sales tax return for the month of August 1956, in violation of Section No. 6, Ordinance No. 40 of said City (R., pp. 3-7). It was his second conviction in the same Court of the same offense upon like facts (R., pp. 15, 49) (Sup. R., pp. 80, 81). He was represented by counsel (R., pp. 8, 9). He appealed to the District Court for the Territory of Alaska, Third Division at Anchorage, and the cause was set for trial at 10:00 o'clock A.M., Monday, October 21, 1957. On said date and at said time, when the case was called for trial, his counsel moved for con-

tinuance, which the Court granted, re-setting the case for trial at 10:00 o'clock A.M. of Wednesday, October 23, 1957 (R., pp. 10, 11).

The cause came on regularly for trial on said date, and upon the trial respective counsel stipulated to certain facts orally (R., p. 11) (Sup. R., pp. 63-69). Such stipulation of facts was made in order to facilitate the hearing of the case, save time for the Court and avoid the calling of witnesses and presentation of evidence (R., pp. 14, 15, 48, 49) (Sup. R. pp. 64-69).

Appellant's counsel informed the Court that the defendant (appellant herein) would not take the witness stand (Sup. R., pp. 66, 67). No witnesses were called by either party, counsel having orally stipulated to all the facts of the case, whereupon the Court directed counsel to prepare and submit written stipulation in accordance with said oral stipulation. There then remained only a question of law to be determined (R., p. 11). Whereupon, counsel for the defendant orally moved the Court for judgment of acquittal on the grounds that the sales tax ordinance under which the defendant is charged is void (R., p. 11) (Sup. R., pp. 65, 66). The Court reserved decision and proceeded to direct counsel, within specified time limits, to file briefs on the question of law raised by the defendant (R., pp. 11, 12) (Sup. R., pp. 68, 69).

Following the trial, appellant's counsel then, on October 31, 1957, filed *nunc pro tunc* his written motion for judgment of acquittal (R., pp. 13, 14); a hearing was had thereon, arguments of counsel were heard on November 15, 1957, and the Court reserved its deci-

sion (R., p. 46) (Sup. R., p. 80). The Court filed its Memorandum Opinion on December 31, 1957, denying appellant's motion for judgment of acquittal, and setting Monday, January 6, 1958, for the imposition of sentence (R., pp. 48-51) (Sup. R., p. 80). On said date appellant, appearing personally and by counsel, made his statements to the Court for and in his behalf and was sentenced to serve 30 days in jail, 29 of which were suspended, and to pay a fine of \$300.00. Formal judgment of conviction, accordingly, was filed and entered on January 7, 1958, and appeal was taken to this Honorable Court (R., pp. 53, 54, 55).

ARGUMENT.

I.

SALES TAX ORDINANCE NO. 40 OF THE CITY OF PALMER, ALASKA, IS VALID, HAVING BEEN DULY ENACTED BY THE CITY COUNCIL AFTER REFERENDUM ACCORDING TO LAW, AND THE 1949 TERRITORIAL ENABLING ACT AUTHORIZING CITIES TO LEVY SALES TAXES WAS NOT REPEALED IN 1951.

Ordinance No. 40 of the City of Palmer under which appellant, Alfred V. Hagen, was convicted in the Magistrate's Court and again in the District Court upon appeal, constitutes a valid exercise of the governmental functions of the City of Palmer by authority conferred by Chapter 38, Session Laws of Alaska, 1949. The full text of this statute is set forth as Appendix A to this brief.

Ordinance No. 40 of the City of Palmer was enacted according to law and after referendum and approval

by the electorate of the City of Palmer at a special election held on July 10, 1951 (R., p. 16). The appellant contends in his first issue presented (Appellant's Brief, pp. 9-31) that Ordinance No. 40 is void by virtue of implied repeal of the sales tax section of Chapter 38, SLA 1949, by the enactment of Chapter 47, SLA 1951. The full text of this statute is set forth as Appendix B to this brief.

To bolster such contention, appellant has promulgated a series of self-serving statements presented as facts (Appellant's Brief, pp. 10-12), but which are not in the record, which do not conform to the record and which have no basis in truth or fact. For instance, the "matters of public record" which are set forth on pages 10 and 11 of Appellant's Brief are non-existent. The following statement appears on page 10 of Appellant's Brief:

"It is a matter of public record that there existed a large body of public opinion in the Territory of Alaska dissatisfied with the law and claiming that its provisions led to irresponsibility and waste in municipal government."

The foregoing statement is without foundation and must necessarily depend on its proponent's interpretation of the word "large", if there was any such dissatisfaction at all.

The statement on page 11 of Appellant's Brief that:

"It is also a matter of public record that considerable confusion resulted from this method of accomplishing repeal of the sales tax and that many Alaskan cities continued to collect sales taxes in the belief that no repeal had been intended.",

is simply not so. There is no such record; there was no such confusion because the 1951 Legislature did not repeal, nor did it even consider repeal of the sales tax enabling act (Journals of the Senate and House of Alaska, 1951 Session).¹

The following statement (Appellant's Brief, p. 11) likewise has no basis in fact:

"This controversy was again carried to the 1953 session of the Territorial Legislature, where the conflict was resolved in favor of strong municipal importuning for re-enactment of sales tax authority, resulting in the passage of Chapter 121, SLA 1953."

The full text of Chapter 121, SLA 1953 is set forth as Appendix C to this brief. Again, the record refutes the foregoing statement of appellant (Journals of the Senate and House of Alaska, 1953 Session).²

On pages 12 and 13 of his brief, appellant, by reading Chapter 121, SLA 1953 (Appendix C), together

¹Chapter 47, SLA 1951, originated in the Senate as Senate Bill No. 9. It would be too cumbersome here to cite the numerous pages of the journals where this legislation was considered in order to prove a negative. The comprehensive tables in the back of the journals set forth each page where Senate Bill No. 9 is mentioned. At no place in either the Senate or the House Journal is there mentioned "sales tax" or anything appertaining thereto.

²Chapter 121, SLA 1953 originated in the House as House Bill No. 33. In order to prove a negative, it would be too cumbersome to cite the numerous pages where this legislation was considered. The comprehensive tables in the back of the journals set forth each page where House Bill No. 33 is mentioned. At no place in either the Senate Journal or the House Journal is there mentioned any "controversy" or "municipal importuning." This Bill passed the Senate by a vote of 15 yeas and 1 nay and the House by unanimous vote of 23 yeas and 0 nays.

with another act of the 1953 Legislature,³ which confers authority upon cities of the second class to levy sales taxes, presumes four intendments of the legislature which, if true, would have the effect of granting sales taxing authority to all first and second class cities in Alaska, and validating and confirming the collection of all sales taxes made theretofore by all first and second class cities *except* those cities of the first class⁴ which had held their referendums between the periods of enactment of Chapter 47, SLA 1951 and Chapter 121, SLA 1953.

No reason is given as to why the 1953 Legislature on the one hand would enact sales taxing authority for second class cities for the first time, validating and confirming prior unauthorized sales tax ordinances of such cities, and on the other hand deny the same validation in the case of first class cities. There can be no logical reason for such legislative discrimination. Thus, it is apparent that the 1953 Legislature did not intend such discrimination *because it did not question the authority of first class cities to enact sales tax ordinances at all times from the year 1949 forward.*⁵

On pages 18 and 19 of his brief, appellant places heavy emphasis on the common use of a statement in amendatory acts that the original law is amended "to

³Chapter 92, SLA 1953 (See Appendix D).

⁴Palmer is a city of the first class.

⁵Chapter 92, SLA 1953, set forth in toto in Appendix D, contains the following validation clause: "Section 3. All sales tax ordinances, otherwise valid, which have been enacted by cities of the second class prior to the effective date of this Act under the provisions of subsection (b) of Chapter 38, Session Laws of Alaska 1949, are hereby validated and confirmed."

read as follows'', and argues that since this is the language used in Chapter 47, SLA 1951 (Appendix B), all matter in the amended Act, Chapter 38, SLA 1949 (Appendix A), that is omitted in the amendment is to be considered repealed. Section 1932 of Sutherland on Statutory Construction (3rd edition) covers this matter thoroughly, stating the general rule that where the legislature employs such statement it thereby declares that the new statute is a substitute for the original act or section, and immediately following, goes on to say:

“However, being merely a rule for determining the intent of the legislature, it is not absolute and must yield when the intent of the legislature is otherwise indicated to be to the contrary—that the provisions of the original act or section which were omitted are not repealed. Such an intent of the legislature may be indicated by a consideration of the amendatory act in its entirety, or by contemporaneous legislation on the same subject or by other circumstances surrounding the enactment of the amendment.”

Sutherland on Statutory Construction (3rd ed.)

Sec. 1932, and cases there cited, including the following:

State ex rel. Moose v. Turlock (Ark. 1913) 160 S.W. 516;

Wallace v. McCartney (Ark. 1923) 252 S.W. 600;

In Re Rochester Water Com'rs (N.Y. 1876) 66 N.Y. 413;

State ex rel. Board of Regents of Normal Schools v. Donald (Wis. 1916) 157 N.W. 782;

Winter v. Hindin (Del. 1926) 136 Atl. 280;
Mitchell v. Walden Motor Co. (Ala. 1937) 177
 So. 151;
Bank of the Metropolis v. Faber (N.Y. 1896) 44
 N.E. 779;
Bierer v. Blurock (Wash. 1894) 36 Pac. 975;
Arkansas Railroad Commission v. Stout Lum-
ber Co. (Ark. 1923) 255 S.W. 912.

In *State ex rel. Moose v. Turlock*, supra, the facts are closely parallel with those of the case at bar. There the legislature employed the phrase "amended to read as follows" in amending a tax act, then added a new provision, but failed to restate certain portions of the act amended. In holding that a certain clause of the original act was not repealed by the amendatory act, notwithstanding the use of the phrase "to read as follows", the Court, quoting New York cases and other authority, said:

"The effect upon a prior statute of a subsequent amendment 'so as to read as follows' is not to be determined in all cases by any fixed and absolute rule, but frequently becomes a question of legislative intent to be determined from the nature and language of the amendment, from other acts passed at or about the same time and from all the circumstances of the case. The duty of the courts is to give effect to the legislative intent rather than the literal terms of the act."

In *Arkansas Railroad Commission v. Stout Lumber Co.*, supra, the amendatory act employed the phrase "amended to read as follows" and then proceeded to amend Section 5 of the original act, which consisted

of parts A, B and C, by setting forth a provision labeled "D" without restating the provisions of parts A, B and C. The Court held that provision D was not substituted for the Section 5 as originally enacted but added thereto, in view of the intention of the legislature, as expressed in the language used and as determined by other acts enacted at the same session.

It is well settled that a law is not presumed to be repealed by implication; conversely, the presumption is against an implied repeal.

Frost v. Wenie, 157 U.S. 46;

U. S. v. Greathouse, 166 U.S. 601;

U. S. v. Noce, 268 U.S. 613;

Pullen v. Morgenthau, 73 F.(2d) 281;

Stewart v. U. S., (CCA 9th 1939) 106 F.(2d) 405;

Lewis v. U. S., 244 U.S. 132.

The entire problem of determining the extent to which existing legislation is repealed by subsequent statutes ultimately resolves itself into one of legislative intent.

Mathews v. Murchison, (CCA 9th 1927) 12 Fed. 760;

Continental Ins. Co. v. Simpson, (CCA 4th 1925) 8 Fed.(2d) 439;

Posadas v. National City Bank of New York, 296 U.S. 497 (1936).

The following is quoted from Crawford on Statutory Construction and Interpretation of Laws (1940 ed.), Sec. 310, page 630:

The Presumption Against Implied Repeal—"As is thus apparent, the courts do not look with favor upon implied repeals, and the presumption is always against the intention of the legislature to repeal legislation by implication. The absence of an express provision in a statute for the repeal of a prior law gives rise to this presumption, which is accentuated where the various statutes were enacted at the same session of the legislature. Consequently, as we have already indicated, the intent to repeal must clearly appear, and such a repeal will be avoided if at all possible."

Sutherland on Statutory Construction, Vol. 1 (3rd ed.), Sec. 2007, has this to say on the subject of applying the rules of statutory interpretation to repealing statutes:

"Repealing statutes are subject to the general rules of statutory construction applicable to all legislative enactments. Thus, in determining whether or not a repeal has been effectuated, the environment, association and character of the statute in its field of operation, the history of previous legislation, the legislative history of the act, and the nature of the defect sought to be remedied by its enactment are all important factors to be considered by the courts. Likewise, the rules pertaining to mandatory and permissive verbs, and the time of taking effect may be of conclusive significance. The courts will not ascribe to the legislature an intent to create absurd or harsh consequence, and so an interpretation avoiding absurdity is always to be preferred.

"But it must be observed in the interpretation of repealing legislation, just as in the interpreta-

tion of all legislation, that no single criterion can be conclusive of whether a repeal has been effectuated. Instead, consideration must be given to them all. Each factor must be given its own evaluation, all must be weighed against one another, and, most important of all, the rules must be applied with reasonableness. It is only upon this basis that certainty, justice and uniformity can be achieved.”

The consequences would be harsh indeed, had the 1951 Legislature repealed the sale-taxing authority of Alaskan cities, and the ultimate in absurdity would have been reached, had such repeal been accomplished by implication, by mere omission, rather than express repeal, and by concealing the intent to repeal in failing to so state the fact in the title of the amendatory act. Irreparable damage would have been done to Alaska's first class cities, most of which were dependent on sales tax revenues to support the usual governmental functions and improvements ranging from garbage collection to the financing of sewers, water systems and street paving projects. Faced with the postwar influx of people into Alaska, and their demands for more municipal services and improvements, most Alaskan cities enacted sales tax ordinances promptly upon passage of the enabling act of 1949 (Appendix A). The author of this brief, who is in his fifteenth continuous year of residence in Alaska, knows of no instance where an Alaskan city has abandoned the sales tax, and so states the fact to be. Indeed, every city which had adopted a sales tax measure prior to 1951 continued to collect the tax during 1951, 1952 and 1953. Certainly, the

1951 Legislature did not intend to create the absurd consequence of destroying a prime source of revenue for these cities by means of an implied repeal of their sales tax enabling legislation.

Likewise, there could be no logical reason for the 1953 Legislature to discriminate against certain first class cities, including Palmer (as appellant contends), by ratifying all sales taxes previously levied and collected except in those cities where the referendum was held after enactment of Chapter 47, SLA 1951 (Appendix B).

The obvious and only purpose of the ratification clause of the 1953 act (Sec. 2, Chapter 121, SLA 1953, Appendix C herein) was to ratify all sales taxes levied and collected pursuant to valid ordinances—that is to say, ordinances enacted pursuant to referendum and with proper observance of procedural requirements.

Sales Tax Ordinance No. 40 of the City of Palmer met these requirements, and so stated the fact in the preamble thereof (R., p. 16). It is noteworthy that the above-mentioned ratification clause applies to “municipalities”, i.e., cities of all classes (see Appendix C, last section). It applies equally to cities of the first and second classes, and ostensibly could have been included in the act principally for the benefit of second class cities whose authority to levy sales taxes in any form may have been in doubt, but who nevertheless had been doing so. There is nothing in the act of 1953 (Appendix C), or elsewhere, to indicate that the legislature thought the sales tax enabling legislation of 1949 (Appendix A) had been repealed

or that first class cities (only) which enacted ordinances after passage of Chapter 47, SLA 1951 (Appendix B) were to be left "holding the bag" for sales taxes collected in good faith, in the public interest alone, and to enable them to perform their true functions as local government organs.

In the case of the City of Palmer, it is a matter of public municipal record (to borrow one of appellant's perquisites in quoting "public records") that from the time of its incorporation as a first class city in the year 1951 to the year 1955, which includes the "period of repeal" as appellant designates it, the sales tax was its sole source of revenue. There was no property tax or other tax levied. Also of record is the fact that in 1952 a portion of the City's annual sales tax revenue was pledged for twenty years thence toward payment of a municipal bond issue of \$337,000.00 for construction of the City water system. The appellant, Alfred V. Hagen, as a member of the City Council, voted not only for the enactment of Ordinance No. 40 (see Stipulation No. 6, R., p. 15), but for such future pledge of sales tax moneys as well, with unanimous concurrence of the other councilmen!

Were its sales tax ordinance to be held invalid, consequences to the City of Palmer would be disastrous. It is a fast growing, modern Alaskan city, and in 1957 was granted an award by LOOK magazine in recognition of progress achieved by its citizens in improving the homes and residential areas of the community. In the past six years it has constructed a \$500,000 water system. In the past year it has paved two miles of its

city streets. It is now planning an urgently needed extension to its sewer system. Its schools are overcrowded, and the school district of which it is a part is now constructing expensive additions to the schools. Most of this has to be paid for from sources of local taxation. The City has a bonded indebtedness of \$530,000 which is near to the maximum bonded indebtedness allowed by law upon the basis of the total assessed valuation of its real and personal property. It depends heavily on its sales tax revenue in performing its municipal functions and in paying off its bonded debt, above mentioned. Had the 1951 Legislature repealed the authority upon which it and other cities similarly situated levied their sales taxes, municipal progress in Alaska, at the least, would have been critically impaired. It is not reasonable that the legislature could have intended such repeal and such consequences.

The title of the 1951 act (Appendix B) negates, *per se*, any intent to legislate upon the subject of sales tax. Alaska, along with many States, has a constitutional provision concerning titles to its statutes. Section 8 of the Organic Act (ACLA 1949, Section 4-3-1) provides:

No law shall embrace more than one subject which shall be expressed in its title.

The 1949 Legislature expressed the subject in the title when it enacted Chapter 38, SLA 1949 (Appendix A), granting Alaskan cities the authority, for the first time, to levy sales taxes, as follows:

Chapter 38, SLA 1949

An Act to empower city councils, pursuant to referendum, to levy sales taxes within their re-

spective municipalities; and amending subsection Ninth of Sec. 16-1-35, ACLA 1949.

The above statute made no change in the existing law, which pertained only to a general tax on real and personal property for school and municipal purposes. It added the sales tax authority to the existing law as subsection “(b)” thereof, to contain two subjects, namely, a general tax on real and personal property (subsection (a)) and a sales tax on sales and services (subsection (b)).

The title of the 1951 act (Appendix B) reads as follows:

Chapter 47, SLA 1951

An Act amending subsection Ninth of Sec. 16-1-35, ACLA 1949, as amended by Chapter 38, SLA 1949, pertaining to a general tax for school and municipal purposes.

This statute made no reference to the sales tax portion of the law (subsection (b)) and “sales tax” is not mentioned in its title. Its purpose was to meet the needs of booming municipalities by increasing the maximum allowable general tax levy on real and personal property from 2% to 3% and not to reduce municipal revenues in a period of rising costs and inflation. Since the subject of sales tax is not embraced in the title, it follows that (1) the legislature did not intend to tamper with the sales tax subsection, or (2) assuming *arguendo* that it did so intend, it violated Section 8 of the Organic Act (*supra*) in not expressing the subject of sales tax in the title.

Sutherland on Statutory Construction (3rd ed.), Vol. 1, Sections 1702 and 1707, outlines the purpose and effect of the constitutional provision concerning titles as follows:

The constitutional requirement that every law shall have but one subject which shall be expressed in the title was not imposed to hamper or impede the legislative process. It was not designed as a loophole of escape from, or a means for the destruction of legitimate enactments. The number of statutes required to effect a given purpose is not to be needlessly multiplied, nor is the scope of the required single subject to be unduly restricted. The dominant objective to the provision is to insure the titling of legislative acts in a manner that will give reasonable notice of the purview to the members of the assembly, and to the public. All that is necessary is that anyone interested in or affected by the subject matter of the bill be put upon inquiry. *The general test is whether the title is uncertain, misleading or deceptive to the average reader*, and if the court feels that the title is sufficient to direct a person of ordinary, reasonable inquiring mind to the body of the act, compliance with the constitution has been effected. (Emphasis supplied.)

Aside from the invalidity that occurs when a statute is duplicitous, a statute will be invalid if its title completely fails to apprise legislator or public of the nature, scope, or consequences of its operation. (Emphasis supplied.)

It is manifest that nothing in the title of the 1951 act (supra) would apprise the public or even a legislator of the repeal of the sales tax law, to say nothing

of the nature, scope or consequences of the operation of such repeal. Hence, the sales tax enabling act of 1949 (Appendix A) was not repealed and Ordinance No. 40 of the City of Palmer enacted thereunder, pursuant to referendum duly held, wherein more than 55 percent of the qualified voters approved, is a valid exercise of the taxing powers of the City.

That the repeal of the original ordinance, No. 10, and its re-enactment as Ordinance No. 40 with only two or three minor changes⁶ does not require a second referendum is academic.

The District Court for the District of Alaska, Third Division, upheld such repeal and re-enactment recently in *The Town of Seward v. Emma Lu Garrett d/b/a New Northern Bar* (see Appendix E). That was a criminal case brought under a section of the Seward ordinance similar to that under which appellant was charged in the case at bar. The charge was the same, namely, failure to file a tax return upon the date required by the ordinance. The facts are quite similar to those before the District Court in the case at bar, the principal difference being that in *Town of Seward v. Garrett*, the defendant failed both in collecting the tax from the public and in filing the monthly return, while in the case at bar, the appellant *did collect the tax from the public but retained possession of the same for months, and failed to file a return or account for such collections to the City* (Sup. R., p. 75). The

⁶Changes were: The scale was changed to start at 25 cents instead of the former 34 cents, and certain minor changes in Section 4 as to sales exempted from the tax.

opinion in the *Seward* case is set out in Appendix E not particularly for its value as authority in this case at bar, but also because it illustrates the problem of Alaskan cities in law enforcement and the deliberations of a local court, which is in position to hear and know the mischief which might be wrought upon Alaskan municipalities by venal and litigious pettifogs.

Another act of the 1951 Legislature, Chapter 96, SLA 1951 (Appendix F), when read together with Chapter 47, SLA 1951 (Appendix B), refutes with finality all argument that the 1951 Legislature intended to repeal existing sales tax legislation. It is noteworthy that this act was passed by the same legislature on March 24, 1951, *three days after* passage of Chapter 47, SLA 1951. This later act granted both independent school districts and incorporated school districts, for the first time in Alaskan history, authority to levy sales taxes within their corporate boundaries. It is also noteworthy that subsection B, the sales tax portion of this Act, is identical in verbiage with subsection (b) of Chapter 38, SLA 1949 (Appendix A) except for the necessary substitution of names and excepting the last sentence thereof which reads:

“It is further provided that no tax shall be levied or imposed hereunder upon either sales or services made within any incorporated municipality or school district which is a part of any independent school district where such incorporated municipality levies a consumer’s sales tax upon the sales price of either or both retail sales and services made within it.”

Since many school districts in Alaska contain incorporated municipalities within the school district boundaries, the foregoing speaks for itself and no stronger proof of legislative intent *not to change the existing sales tax law* could one expect to find.⁷ Certainly the legislature did not intend to withdraw sales taxing authority from municipalities on the one hand and grant the same to school districts on the other; and *a fortiori* in abject contradiction of itself, forbid the levying of the sales tax by school districts in areas *where a city already was making such levy*.

It is to be conceded, as appellant states on pages 26-31 of his brief, that the authorities cited in the Memorandum Opinion of the District Court (R., pp. 48-51) do not constitute "cases in point" as to the validity of the City of Palmer's sales tax ordinance.

The Court denied defendant's motion for judgment of acquittal, based on the single question of the validity of the sales tax ordinance (R., pp. 13, 14), which it could do, and did without citing any authority. In fact, the Court stated in its Memorandum Opinion "*that it is not necessary for the Court to determine the validity of the original or amendatory statutes or the ordinances here in question*" (emphasis supplied) (R., p. 50). Whether the Court was correct in this statement, it did in fact refuse to rule upon the validity of the legislation, and did in fact deny the defendant's motion.

⁷The City of Palmer is contained within the boundaries of the larger entity, Palmer Independent School District.

Certainly the Court was aware the law of estoppel does not generally apply in criminal cases, nor specifically in this case. The language used and the three cases cited are *obiter dicta* merely. It is apparent the Court's purpose here was to comment on the moral and equitable aspects of the conduct of the defendant, and it did so in its Memorandum Opinion (R., pp. 48-51) with the following language:

"When the defendant collected the taxes he became the agent of the City of Palmer and as such is obligated to account to the City, as principal . . ." (R., p. 50).

Then followed the citations on the subject of agency of which the appellant complains. The Court, had it been more blunt, might have said instead, "There is agency involved here and the withholding of a principal's money under certain circumstances becomes embezzlement." The Court's dictum is especially understandable in view of the fact the appellant had been convicted previously of the same offense and that in one instance he had withheld municipal sales tax moneys and failed to file his sales tax returns for a period of seven months! (R., pp. 15, 49; Sup. R., pp. 81, 89, 90).

II.

APPELLANT'S CONTENTION THAT THE JUDGMENT OF CONVICTION IS INVALID BECAUSE OF A FATAL VARIANCE WITH THE COMPLAINT UPON WHICH IT IS BASED AND BECAUSE IT IS UNSUPPORTED BY THE STIPULATED FACTS IN THIS CASE IS WITHOUT MERIT.

The crime of which the appellant was convicted in the District Court, not having been indictable at common law, is one which falls into a class of petty or minor offenses.

Callan v. Wilson, 127 U.S. 540;

District of Columbia v. Clawans, 300 U.S. 617.

Section 66-9-14, ACLA 1949, provides as follows:

That the indictment is sufficient if it can be understood therefrom:

First. That it is entitled in a court having authority to receive it, though the name of the court be not accurately stated;

Second. That it was found by a grand jury of the political division in which the court was held;

Third. That the defendant is named, or if his name can not be discovered, that he is described by a fictitious name, with the statement that his real name is to the jury unknown;

Fourth. That the crime was committed within the jurisdiction of the court;

Fifth. That the crime was committed at some time prior to the finding of the indictment, and within the time limited by law for the commencement of an action therefor;

Sixth. That the act or omission charged as the crime is clearly and distinctly set forth in ordi-

nary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended; Seventh. That the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case.

The information (styled "complaint" under local practice) meets all the foregoing requirements of a sufficient indictment, excepting, of course, part "Second" which applies to indictments only, and not informations.

In *Simpson v. U. S.*, 289 Fed. 188 (CCA 9th 1923), this Court held:

An indictment is sufficient where it advises the defendant with reasonable certainty of the crime with which he is charged, where its meaning is plain, where a person of ordinary intelligence cannot be misled as to the nature of the charge, and where the averments are sufficient to enable the defendant to prepare his defense and, in the event of acquittal, to plead the judgment in bar of a second prosecution of the same offense. (Citing *Williamson v. U. S.*, 207 U.S. 425 and *Burton v. U. S.*, 202 U.S. 344.)

It is often recognized that less rigid nicety is exacted in accusations for misdemeanors than where felonies are charged.

U. S. v. Mills, 7 Pet. (U.S.) 138;

State v. Bennett, 14 S.W. 865.

Section 6 of Ordinance No. 40 requires that sales tax returns shall be filed each month with the City Clerk, by every seller, *on or before* the 10th day of the following month (R., p. 25). With reference to the fifth clause of Sec. 66-9-14, ACLA 1949 (*supra*), the crime was committed *ipso facto* at the end of the 10th day of September 1956, when the accused had failed to file his sales tax return *on or before* said date. Hence, the crime was committed prior to the filing of the information on November 15, 1958. Referring to the sixth clause of Sec. 66-9-14, ACLA 1949 (*supra*), the complaint sets forth the omission of the accused clearly and distinctly and in ordinary and concise language as follows:

The said Alfred V. Hagen d/b/a Valley Theatre in the City of Palmer, Alaska and within the jurisdiction of this Court, did, wilfully

Fail to file a sales tax return for retail sales and service made and performed during the month of August, 1956, in violation of Section No. 6, Ordinance No. 40, and *contrary to said Ordinance of the said City of Palmer, in such case made and provided*, and against the peace and dignity of the People. (R., p. 6; emphasis supplied.)

There is only *one* August 1956, there can be only *one* prosecution for failure to file tax returns therefor, there can be only *one* point in time when the accused could have come into violation of the ordinance, namely, at the end of the 10th day of September, as provided by Ordinance No. 40, which he formerly en-

forced against others as a member of the City Council and as Mayor of the City of Palmer (R., p. 15) (Sup. R., p. 82). It is certain that the appellant was able to understand what was intended, within the meaning of the sixth clause mentioned above. With reference to the seventh clause of Sec. 66-9-14, ACLA 1949, the Court pronounced judgment "according to the right of the case" by holding "that the defendant had been convicted of the offense as charged in the complaint" (See Judgment, R., pp. 53, 54.)

Appellant contends (Appellant's Brief, pp. 32, 33, 34) there is a "fatal variance" between the complaint and the judgment on the one hand and the facts as stipulated on the other.

Though there are exceptions as to matters of jurisdiction, it is a general rule of law that variance cannot be taken advantage of after verdict.

People v. Formosa, 30 N.E. 492;

State v. Gibson, 85 S.E. 7;

State v. Meyers, 18 S.E. 892.

The appellant was represented by counsel at all stages of this case, beginning with the Magistrate's Court in the City of Palmer (R., pp. 8-16). While counsel for appellant filed motions to disqualify the magistrate and to quash the warrant of arrest and dismiss the complaint (R., pp. 8, 9), at no time either in the Magistrate's Court or in the District Court was motion made or objection taken to the sufficiency of the charge as stated in the complaint.

It follows that if the complaint is found to be sufficient and the stipulated facts found adequate, there can be no fatal variance with the judgment which makes a finding of guilt "as charged in the complaint" (R., p. 54).

III.

THE MOTION FOR JUDGMENT OF ACQUITTAL WAS NOT SUBMITTED UPON STIPULATED FACTS; THE FINDING OF GUILT BY THE DISTRICT COURT WAS NOT "SUMMARILY" DONE; THE APPELLANT WAS NOT ENTITLED TO A TRIAL BY JURY; AND THE APPELLANT WAS NOT DEPRIVED OF DUE PROCESS OF LAW.

The motion for judgment of acquittal in the District Court had no connection with the stipulated facts, which were made solely *in order to avoid putting on testimony* (R., pp. 14, 48, 54; Sup. R., pp. 64, 65, 66). At the trial on October 23, 1957, appellant's counsel informed the Court as follows:

Mr. Tulin. If the Defendant were to take the stand, it certainly would be a matter for credibility but he is not taking the stand. There is no need of taking the stand. It turns on a question of law, which I propose to argue. (Sup. R., pp. 66, 67.)

Thus, appellant stipulated to the facts of the case, declining to take the witness stand or present any evidence, and elected to rely upon the question of the validity of Ordinance No. 40 as his sole defense. Stipulation of fact No. 3 was an unqualified admission of the charge in the complaint as follows:

3. That the defendant failed to make timely filing of his sales tax return as *charged in the complaint* . . . (emphasis supplied, R., pp. 14, 48).

Hence, the District Court did not “summarily find appellant guilty”, but made such finding pursuant to formal trial upon stipulated facts.

The appellant is not entitled to a jury trial. The right to jury trial in cases appealed from Municipal Courts consistently has been denied by the District Courts of Alaska. The Amended Uniform Rules of the District Court for the District of Alaska (effective October 1, 1957) provides:

Rule 18. *Appeals from Magistrate's Court: Jury.* Cases appealed to the district court from the magistrate's court of a city or a town shall be tried by the court without a jury, except in those cases where jury trials must be given as a matter of constitutional or statutory right.

This rule has been carried over from previous compilations of the rules, and in the Courts of Alaska offenses as created by city ordinances in Alaska are considered petty offenses; and no provision has been made for trial by jury in the City Magistrate's Court despite the provisions of the Sixth Amendment to the Constitution of the United States.

Were Sec. 66-13-2, ACLA 1949, which appellant urges as requiring jury trial in this case (Appellant's Brief, p. 35) held to be mandatory upon all criminal cases in Alaska, then jury trials would have to be pro-

vided not only in cases appealed to the District Court from City Magistrate's Courts, but in all cases in the Municipal Courts as well, even in petty cases involving the violation of traffic regulations. For there is no express legislation on the subject extant in Alaska.

In this case, there was no issue of fact involved, the facts having been agreed upon and stipulated to; and no evidence having been presented there was nothing for a jury to try.

U. S. v. Harris, 106 U.S. 629;

Case of Supervisors v. Kennicott, 103 U.S. 554;

District of Columbia v. Clawans, 300 U.S. 617;

Schick v. U. S., 195 U.S. 65.

This case involves a petty offense which does not require a jury trial.

In any event, the appellant waived a jury trial by going to trial without demanding it.

City of Fort Scott v. Arbuckle (Kan. Sup. Ct. 1948), 187 Pac. (2d) 348.

CONCLUSION.

At every stage of this case, the appellant was represented by skilled counsel, both in the City Magistrate's Court and the District Court. He was not lacking in means to enforce every legal right the law affords him. He stipulated to the facts in the District Court, admitting unqualifiedly the charge against him and based his sole defense on the question of the

validity of the ordinance under which the charge was brought. The ordinance being valid and the judgment being in accord with the evidence, i.e., the stipulated facts, the judgment of the District Court should be sustained.

Dated, Palmer, Alaska,
December 8, 1958.

Respectfully submitted,

JOHN D. SHAW,

City Attorney of the City of Palmer, Alaska,

Attorney for Appellee.

(Appendices Follow.)

Appendices.



Appendix "A"

Chapter 38, SLA 1949

AN ACT to empower City Councils, pursuant to referendums, to levy sales taxes within their respective municipalities; and amending subsection Ninth of Sec. 16-1-35 ACLA 1949.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That subsection Ninth of Sec. 16-1-35 ACLA 1949 is hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy, and collect a general tax for school and municipal purposes not to exceed two per centum of the assessed valuation upon all real and personal property and to enforce the collection of such lien by foreclosure, levy, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder not exceeding Two Hundred Dollars (\$200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organization and all monies on deposit, shall be exempt from taxation. Provided, further, that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt. Provided, further, that the laws excepting cer-

tain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation.

(b) **CONSUMER'S SALES TAX.** To levy and collect a consumer's sales tax not exceeding two per centum of the sales price on all retail sales and services made within the municipality; provided, that the consent of the qualified voters of the municipality is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and if for a special purpose, same shall be specified on the ballot. If fifty-five percent (55%) or more of the votes cast in said referendum are in the affirmative, the council may thereafter enact such a tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the municipality. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and that although such method of taxation be established within a city, the council may at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum.

Approved March 14, 1949.

Appendix "B"

Chapter 47, SLA 1951

AN ACT amending subsection Ninth of Sec. 16-1-35
ACLA 1949, as amended by Chapter 38 SLA
1949, pertaining to a general tax for school and
municipal purposes.

*Be it enacted by the Legislature of the Territory of
Alaska:*

Section 1. That subsection Ninth of Sec. 16-1-35
ACLA 1949, as amended by Chapter 38 SLA 1949, is
hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL
AND MUNICIPAL PURPOSES. To assess, levy,
and collect a general tax for school and municipal
purposes not to exceed three per centum of the as-
sessed valuation upon all real and personal property,
and to enforce the collection of such lien by foreclo-
sure, levy, distress and sale. Provided, however, that
all property belonging to the municipality or the Ter-
ritory, and the household furniture of the head of
the family or a householder, not exceeding Two Hun-
dred Dollars (\$200.00) in value, as well as all prop-
erty used exclusively for religious, educational, chari-
table purposes and the property of any organization,
not organized for business purposes, whose member-
ship is composed entirely of veterans of any wars
of the United States, or the property of the auxiliary
of any such organization, and all monies on deposit,
shall be exempt from taxation. Provided, further,

that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt. Provided further, that the laws excepting certain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation.

Approved March 21, 1951.

Appendix "C"

Chapter 121, SLA 1953

AN ACT to empower city councils to levy a general tax for school and municipal purposes, and to levy sales taxes within their respective municipalities; and amending subsection Ninth of Section 16-1-35 ACLA 1949, as amended by Chapter 47, Session Laws of Alaska, 1951, and validating sales taxes already collected, and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That subsection Ninth of Sec. 16-1-35* ACLA 1949 is hereby amended to read as follows:

Ninth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy, and collect a general tax for school and municipal purposes not to exceed three per centum of the assessed valuation upon all real and personal property, and to enforce the collection of such lien by foreclosure, levy, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder, not exceeding Two Hundred Dollars (\$200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized

*Sec. 16-1-35, ACLA 1949: "Powers of Council. The council (of a city of the first class) shall have and exercise the following powers: * * * Ninth:

for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organization and all monies on deposit, shall be exempt from taxation. Provided, further, that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt. Provided further, that the laws excepting certain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation.

(b) **CONSUMER'S SALES TAX.** To levy and collect a consumer's sales tax not exceeding two per centum of the sales price on all retail sales, rents and services, made within the municipality; provided that the consent of the qualified voters is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot. If a majority of the votes cast in said referendum are in the affirmative, the council may thereafter enact such tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the municipality. No such sales tax

proposition shall be presented to the voters more than once in any twelve months. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and although such method of taxation be established within a city, the council may, at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum.

Section 2. All sales taxes heretofore levied and collected by municipalities within the Territory of Alaska, pursuant to ordinances which were valid at the time of their enactment, are hereby ratified and confirmed.

Section 3. (Emergency clause)

Approved March 30, 1953.

Appendix "D"

Chapter 92, SLA 1953

AN ACT to empower Second Class Cities, pursuant to referendums, to levy sales taxes; amending subsection Sixth of Section 16-2-5 ACLA 1949; validating and confirming sales tax ordinances enacted prior to the effective date of this Act; and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Subsection Sixth of Section 16-2-5 ACLA 1949 is amended to read as follows:

Sixth: (a) GENERAL TAX FOR SCHOOL AND MUNICIPAL PURPOSES. To assess, levy and collect a general tax for school and municipal purposes, not to exceed three per centum of the assessed valuation upon all real and personal property and to declare such tax with penalty a lien upon such property, and to enforce the collection of such lien by foreclosure, levy, distress and sale, in the manner provided for the collection of taxes in municipal corporations of the first class, and all the provisions of the laws of the Territory relative to the levy and collection of taxes in cities of the first class shall apply with full force and effect to incorporated cities of the second class; Provided, however, that all property belonging to the municipality, all property used exclusively for religious, educational or char-

itable purposes, and the household furniture of the head of a family or householder, not exceeding Two Hundred Dollars (\$200.00) in value, shall be exempt from such tax; Provided, further that the laws exempting certain property from levy and sale on execution shall not apply to said taxes or the collection of the same.

(b) **CONSUMER'S SALES TAX.** To levy and collect a consumer's sales tax not exceeding two percentum of the sales price on all retail sales, rents and services made within the municipality; provided, that the consent of the qualified voters of the municipality is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot. If a majority or more of the votes cast in said referendum are in the affirmative, the council may thereafter enact such a tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the municipality. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and that although

such method of taxation be established within a city, the council may at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum.

Section 2. No such sales tax proposition shall be presented to the voters more than once in any twelve months.

Section 3. All sales tax ordinances, otherwise valid, which have been enacted by cities of the second class prior to the effective date of this Act under the provisions of subsection (b) of Chapter 38, Session Laws of Alaska 1949, are hereby validated and confirmed.

Section 4. (Emergency clause)

Approved March 28, 1953.

Appendix "E"

In the District Court for the District of Alaska

Third Division

Cr. No. 3501

<p>The Town of Seward, a Municipal Corporation,</p>	}	<p>Plaintiff,</p>
<p>vs.</p>	}	
<p>Emma Lu Garrett, d/b/a New Northern Bar,</p>	}	<p>Defendant.</p>

TRANSCRIPT OF OPINION

On Tuesday, March 11, 1958, in open court at Anchorage, Alaska, the Honorable J. L. McCarrey, Jr., U. S. District Judge, rendered the following opinion:

The Court. The court wishes to render its oral opinion in the case of Town of Seward, a Municipal Corporation, Plaintiff, vs. Emma Lu Garrett, d/b/a New Northern Bar, Defendant, Criminal No. 3501.

This is an appeal from a judgment entered by the City Magistrate on the 19th day of September, 1956,

and comes before the court upon the record. The court below adjudged the defendant guilty of the violation of Section 6(a) and 12 of Ordinance 267 of the City of Seward and fined \$50.00 and costs.

It was agreed by counsel that the only issue to be determined by this court on appeal would be the validity of Ordinance 267 under facts that I will hereafter state orally since the defendant has paid the taxes assessed under the ordinance as evidenced by Defendant's Exhibit A in the sum of \$668.67.

A background of the facts in the case will disclose that pursuant to statutory authority found in 16-1-36 ACLA 1949, as amended by Chapter 38, SLA 1949, the City of Seward passed a sales tax in conformance therewith and after apparent full compliance with the law (*supra*) on the 23d day of September, 1949, this ordinance was adopted on the 4th day of June, 1956. In the preamble the ordinance provided that, and I quote:

“WHEREAS, a special election was called and held in conformity and under the provisions of subsection Ninth, Section 16-1-35 ACLA 1949, as amended by Section 1, Chapter 38 of the Session Laws of Alaska, 1949, on the 8th of September, 1949, and at said election more than 55 percent of the qualified voters of the City of Seward, Alaska, voting thereat voted in favor of a 2 percent consumer's sales tax on retail sales and services made within the City of Seward, and

WHEREAS, the City Council of the City of Seward on the 23d day of September, 1949, enacted a consumer's sales tax by the passage of Tax Ordinance No. 190-A for the purpose of providing

additional funds for the construction and operation of more adequate educational and public health facilities and to provide for betterment of the schools and to pay for such school obligations, public health and sanitation, and

WHEREAS, the City Council of the City of Seward has determined that Tax Ordinance No. 190-A should be completely revised, NOW THEREFORE,

BE IT ORDAINED by the City Council of the City of Seward, Alaska, as follows: * * *

and thereafter they set forth the ordinance in detail among which is Section 5 which provides for exceptions and exemptions and then at the end of Section 12 the ordinance provides as follows, and I quote:

“Ordinance No. 190-A is hereby expressly repealed, and all ordinances and parts of ordinances in conflict with this ordinance are hereby repealed, provided however, that any taxes now due and payable under said Ordinance 190-A shall be paid as therein provided.

This ordinance shall take effect and be in full force from and after the date of its passage and approval.

This ordinance passed and approved this 4th day of June, 1956.”

Briefs have been submitted by respective counsel. Counsel for the appellant, defendant, contends that Ordinance 267 is invalid on two grounds: First, because the second ordinance, namely, 267, was not re-submitted by referendum to the voters for approval, and, second, that the tax fails to comply with the requirement of uniformity in that certain exemptions were allowed contrary to statutory authority.

Counsel for the City, appellee, contends that once the proposal and proposition had been submitted to the electorate of the City of Seward for their approval, and the approval was obtained in conformance with statutory requirements, that it was not necessary for the City Council to resubmit it to the taxpayers of the City of Seward for further authorization. In support of its contention they rely upon Section 9 subsection (b) as their authority which provides in part as follows, and I quote: "The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and that although such method of taxation be established within a city the council may at any time abandon same", and thereafter additional recitation follows but which the court will not recite because of its language not being applicable to this problem.

It is to be noted that we have an Alaskan case on this point. That is the case of *Valentine vs. City of Juneau*, found at 36 F2d 904 and 906. In that case the court was construing a resolution of the city council of Juneau, Alaska, which excluded all bonds, monies, and choses in action, including money on deposit from assessment and taxation pursuant to a statutory provision which is now Section 16-1-35 ACLA 1949 as amended by Chapter 38, SLA 1949, subsection 9(a), however, the provisions we are concerned about in this particular problem are found in subsection 9(b). In that case the judge stated and I quote:

"It is well settled, of course, that the Legislature of a state or territory may classify property for

purposes of taxation and may exempt particular property from taxation in the absence of some limitation contained in the constitution, or other organic law. But the authority of a municipal corporation to allow such exemptions, unless expressly conferred by law, has very generally been denied."

Despite this rather strong language the court decided in the Valentine case that the omission of exempted property from the assessment tax roll did not effect the validity of the taxes as a whole, wherein it stated as follows, and I quote:

"Most assuredly, it cannot be said that the omission of property from an assessment roll, through error of judgment of law, will invalidate all taxes, thus practically putting an end to the operations of the Government."

Deleting a portion thereof and then thereafter further quoting Judge Cooley I quote:

"'It has been decided in a number of cases that accidental omissions from taxation, of persons or property that should be taxed, occurring through the negligence or default of officers to whom the execution of the taxing laws is entrusted, would not have the effect to vitiate the whole tax' "

Again in the case in the opinion I find the following language:

"Again, it is not at all clear that the appellant did not have a plain, speedy, and adequate remedy at law. If a decision of the board of equalization was not subject to review by the court of the territory in a direct proceeding, mandamus was

a proper remedy to compel the assessment and taxation of the omitted property.”

Now, applying the Valentine case to the one at issue: Assuming that the City of Seward did allow certain exemptions contrary to the law under the authority of the Valentine case, that would not vitiate the law itself since any aggrieved taxpayer would have a right by way of mandamus to enforce a collection of taxes against that category of property which the City Council unlawfully exempted.

Now, referring then to the other point of the appellant, Number 1, the tax proposal was not resubmitted by referendum to the voters for approval. Although the tax originally was referred to the voters on referendum the City Council thereafter adopted an ordinance and later abandoned the same and still at a later time enacted another ordinance known as 267, *supra*.

I am of the opinion and hereby find that the City of Seward having once complied fully with the statute through the referendum and although Ordinance 267 is confusing in that one portion of the ordinance which refers to a “revision” of Ordinance 190-A, while another portion of the ordinance refers to a complete “repeal” thereof, that this authority remained with the City Council of the City of Seward and it was not necessary, therefore, for them to remand or to submit it back to the voters of the City of Seward for further authorization.

I, therefore, find that the City Ordinance No. 267 is valid and find that the defendant is guilty of having

failed to comply with the law and request that counsel be notified of the finding of this court and that the defendant be brought into court in order that the court can impose a fine in conformance with the ordinance next Friday at the hour of 9:30 a.m.

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a full, true and correct transcription of the proceedings in the rendering of an opinion in the above-entitled cause, taken by me in stenograph in open court at Anchorage, Alaska, on March 11, 1958, and thereafter transcribed by me.

Iris L. Stafford.

United States of America
Territory of Alaska
Third Division—ss.

I, The Undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and the Seal of said Court this 4th day of Dec., 1958.

Wm. A. Hilton,
Clerk of the District Court.

By Rosemary Rice,
Deputy.

[Seal]

In the District Court for the District of Alaska

Third Division

Cr. No. 3501

The Town of Seward,
a Municipal Corporation,

Plaintiff,

vs.

Emma Lu Garrett, d/b/a
New Northern Bar,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 29th day of August, 1956, a complaint was filed in the City Court of the Town of Seward, charging the defendant with a violation of Section 6(a) and 12 of Ordinance 267, and that on the 19th day of September, 1956 the defendant was found guilty as charged in the complaint.

The defendant then appealed the decision of the municipal magistrate and the judgment was affirmed and a \$50.00 fine imposed on the 17th day of March, 1958. The Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

That the defendant, Emma Lu Garrett, doing business as New Northern Bar, failed to comply with the provisions of Section 6(a) and 12 of Ordinance 267.

II.

The only question raised by the defendant on appeal was the validity of Ordinance 267.

CONCLUSIONS OF LAW

1. The defendant is guilty as charged beyond a reasonable doubt as set forth in the complaint.

2. The exemptions allowed in Ordinance 267 do not vitiate the ordinance itself and any aggrieved taxpayer would have a right by way of mandamus to enforce the collection of taxes against any category of property which the city council might have unlawfully exempted. The passage of Ordinance 190-A in the referendum held thereon and all the other procedural requirements were complied with and Ordinance 190-A was lawfully enacted. The passage of Ordinance 267 after Ordinance 190-A which ordinance effected certain provisions of 190-A did not require a referendum in that the city council of the Town of Seward had by virtue of Ordinance 190-A the power to impose this type of tax.

Dated this 2nd day of April, 1958.

J. L. McCarrey, Jr.,

Judge of the District Court.

Receipt of a copy of the foregoing findings & concl. and due and timely service thereof is hereby acknowledged this 2 day of April, 1958.

David H. Thorsness,
Attorney for defendant.

United States of America
Territory of Alaska
Third Division—ss.

I, The Undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and the Seal of said Court this 4th day of Dec., 1958.

Wm. A. Hilton,
Clerk of the District Court.
By Rosemary Rice,
Deputy.

[Seal]

In the District Court for the District of Alaska

Third Division

Cr. No. 3501

<p>The Town of Seward, a Municipal Corporation,</p>	}	<p>Plaintiff,</p>
---	---	-------------------

vs.

<p>Emma Lu Garrett, d/b/a New Northern Bar,</p>	}	<p>Defendant.</p>
---	---	-------------------

JUDGMENT

On the 17th day of March, 1958 defendant appeared and through her attorney, David Thorsness of Davis, Hughes & Thorsness, and the plaintiff Town of Seward appeared through S. J. Buckalew, Jr., Esquire.

It is adjudged that the defendant has been convicted of the offense of failure to comply with Section 6(a) and 12 of Ordinance 267 of the Town of Seward.

It is adjudged that the defendant is guilty as charged in the City Court on a complaint dated the 29th day of August, 1956.

It is adjudged that the defendant pay a fine of \$50.00.

Dated at Anchorage, Alaska, the 2nd day of April, 1958.

J. L. McCarrey, Jr.,
Judge of the District Court.

This Judgment may be entered without further notice to the defendant.

Receipt of a copy of the foregoing Judgment and due and timely service thereof is hereby acknowledged this 2nd day of April, 1958.

David H. Thorsness,
Attorney for defendant.

Entered Journal No. J58 Page No. 258 Apr. 2 1958.

United States of America
Territory of Alaska
Third Division—ss.

I, The Undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and the Seal of said Court this 4th day of Dec., 1958.

Wm. A. Hilton,
Clerk of the District Court.
By Rosemary Rice,
Deputy.

[Seal]

Appendix "F"

Chapter 96, SLA 1951

AN ACT To empower Board of Directors of Independent School Districts or Incorporated School Districts, pursuant to referendums, to levy sales taxes within their respective Independent School Districts or Incorporated School Districts and amending Section 14 of Chapter 77 of the Session Laws of 1935 as amended by Section 2 of Chapter 7 of the Session Laws of the Extraordinary Session of 1946 (Section 37-3-54 ACLA 1949).

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That Section 14 of Chapter 77 of the Session Laws of Alaska, 1935, as amended by Section 2 of Chapter 7 of the Session Laws of the Extraordinary Session of 1946 (Section 37-3-54 ACLA 1949), is hereby amended to read as follows:

A. LIEN AND LIABILITY FOR TAXES: ENFORCEMENT: BOARD TO HAVE TAXING POWERS AND DUTIES OF COUNCIL: REFUNDS. All taxes levied and assessed by the school board under this article shall be a lien upon the property assessed and such lien shall be prior and paramount to all other liens and encumbrances, and may be foreclosed by an appropriate action in any court of competent jurisdiction. The owner of the property assessed shall be personally liable for the amount of taxes assessed against such property; and such taxes,

together with penalties and interest, may be collected after the same has become due, in a personal action brought in the name of the school district against such owner in any court of competent jurisdiction. Provided: That the school boards in independent school districts in the levy and collection of taxes shall have all of the powers and duties given to the common council of municipal corporations and the laws relative to the levy and collection of taxes in municipal corporations are hereby extended to Independent School Districts.

Further provided: That all provisions in Sections 1331 to 1336, inclusive, Compiled Laws of Alaska 1933 (Sections 37-3-61 through 37-3-66 ACLA 1949 herein), requiring refunds of Territorial money to cities and incorporated school districts, and establishing procedures therefor, are hereby made applicable to Independent School Districts.

B. CONSUMER'S SALES TAX. The School Boards in Independent School Districts or Incorporated School Districts shall have the power to levy and collect a consumer's sales tax not exceeding two per centum of the sales price on all retail sales and services made within the Independent School District or the Incorporated School District; provided, that the consent of the qualified voters of the Independent School District or Incorporated School District is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the Independent School District or

Incorporated School District. The ballot shall also set forth whether the tax is to be levied for general revenue for the Independent School District or the Incorporated School District or for a special school purpose, and, if for a special school purpose, same shall be specified on the ballot. If fifty-five per cent (55%) or more of the votes cast in said referendum are in the affirmative, the school board may thereafter enact such a tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the Independent School District or Incorporated School District. The sole purpose of this subsection is to enable Independent School Districts or Incorporated School Districts, with the consent of the residents thereof, to impose sales taxes, and that although such method of taxation be established within an Independent School District or Incorporated School District, the school board may at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum. It is further provided that no tax shall be levied or imposed hereunder upon either sales or services made within any incorporated municipality or school district which is a part of any independent school district where such incorporated municipality levies a consumer's sales tax upon the sales price of either or both retail sales and services made within it.

Approved March 24, 1951.

No. 15935 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

See: Vol. 3068

HOME INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee,

vs.

ARTHUR F. SMALLFIELD,

Appellant.

APPELLEE'S BRIEF.

THOMAS P. MENZIES,

JAMES O. WHITE, JR.,

458 South Spring Street,
Los Angeles 13, California,

Attorneys for Appellee.

FILE

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PAUL P. O'BRIEN

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No. 15935

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

HOME INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee,

vs.

ARTHUR F. SMALLFIELD,

Appellant.

APPELLEE'S BRIEF.

Jurisdiction.

In compliance with Rule 20 (U. S. C. A. 9, Subsec. 2b) appellant states that the statutory provisions believed to sustain the jurisdiction of the District Court to render judgment and of this Court upon appeal to review the judgment are as follows:

UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 2201: DECLARATORY JUDGMENTS: CREATION OF REMEDY.

“In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking

such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 1332: DISTRICT COURTS; JURISDICTION: DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY..

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States; * * *."

UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 1291: COURTS OF APPEALS: FINAL DECISIONS OF DISTRICT COURTS.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

The necessary diversity of citizenship arose from the fact that the plaintiff is a citizen of New York and the defendant is a citizen of California. The amount in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs of suit [R. p. 5].

Statement of the Case.

This cause has been before the United States Court of Appeals for the Ninth Circuit previously on defendant's prior appeal from judgment in favor of plaintiff. We refer to the decision of this Honorable Court reported

in 244 F. 2d 337, at page 341, in which decision this court stated:

“The judgment is vacated and the case remanded to the district court with directions to make findings based only on the properly admitted evidence.”

The remand to the district court was based upon this court's holding that the lower court had buttressed its finding that appellant was not worthy of belief in part on inadmissibility of evidence. This court stated, however:

“Here there is evidence in the record which was properly received which adequately supports the finding that appellant was not worthy of belief. The difficulty is that this finding was buttressed by the trial court's express reliance on evidence which was not admissible.” (244 F. 2d 337, at p. 341.)

On December 30, 1957 argument was presented to the district court but none of the parties requested that further evidence be heard. The district court then rendered new Findings of Fact and Conclusions of Law and based thereon, a judgment in favor of plaintiff and appellee, the Home Insurance Company, and against defendant and appellant, Smallfield. Included in the court's findings is the following:

“And the Court, in compliance with the directions and opinion of the United States District Court of Appeals, Ninth Circuit, having considered only the following evidence, to-wit:

“1) The testimony and demeanor of defendant Arthur F. Smallfield and inconsistent statements made by said Arthur F. Smallfield concerning the

manner in which he acquired the jewelry which said Arthur F. Smallfield claimed had been stolen;

"2) The testimony of defendant's mother, Ruth Mary Lipschultz, and documentary evidence impeaching portions of her testimony, and inconsistencies between her testimony and that of the defendant Arthur F. Smallfield;

"3) Testimony of the following witnesses tending to contradict defendant's testimony as to the acquisition of the jewelry covered by the policy of insurance: Irving Lipschultz, George W. Clark, Arthur Louis Smallfield, Alice Smallfield.

"4) The prior conviction of defendant Arthur F. Smallfield." [Find. of Fact and Conclusions of Law, p. 2, line 19, through p. 3, line 1.]

In summary, the court found that neither Smallfield nor his mother had an insurable interest in the items of jewelry upon which claim was made at the time the policy was issued or at the time when defendant claimed the items were stolen; that defendant filed a false and dishonest claim; that the items which defendant claimed were stolen had not been stolen; that the defendant and his mother violated the terms and conditions of the policy concerning the making of false representations and false swearing, done with the attempt to defraud the insurance company thus voiding the policy; that the defendant's affidavits presented in motion for summary judgment were presented in bad faith.

In the Judgment rendered by the district court the trial court specifically stated:

“* * * and the court having, in compliance with the directions of the United States Court of Appeals, Ninth Circuit, removed from its consideration all of that evidence which said United States Court of Appeals stated to be inadmissible (Smallfield vs. Home Insurance Company of New York, 244 F. 2d 337), and having made and based its findings of fact and conclusions of law solely upon that evidence which said United States Circuit Court of Appeals has stated was properly considered, and the court being fully advised in the premises and good cause appearing therefor: * * *”.

Summary of Argument.

Point 1: The trial court's findings and judgment are in harmony with the prior decision of this Honorable United States Court of Appeals for the Ninth Circuit.

Point 2: The trial court's findings and judgment are supported by the record.

ARGUMENT.

POINT I.

The Trial Court's Findings and Judgment Are in Harmony With the Prior Decision of This Honorable United States Court of Appeals for the Ninth Circuit.

The attack now made by appellant on the district court's findings and judgment completely ignores this court's prior decision wherein it is held that

“* * * there is evidence in the record which was properly received which adequately supports the finding that appellant was not worthy of belief.” (244 F. 2d 337, 341.)

In footnote No. 10 in the same decision this court has listed such evidence as follows:

“*E.g.*, appellant's prior conviction, his inconsistent statements at the trial, and of course, his demeanor which the trial court could properly have considered for this purpose. 3 Wigmore, Evidence Sec. 946.”

Since the points mentioned in the quoted footnote have previously been ruled upon by this court and outlined in previous briefs filed by appellee, we shall not burden this brief with a further recital of the evidence supporting the findings. In this respect this appellate court stated:

“While the trial court could have made the same finding on the evidence which was properly admitted, it did not do so, and we cannot say that it would have done so.” (244 F. 2d 337, 341.)

POINT II.

The Trial Court's Findings and Judgment Are Supported by the Record.

Appellant's argument that based on possession alone the appellant had an insurable interest is bottomed on the unstated premise that the court was required to believe that the appellant was actually in possession of the jewelry at the time of the alleged theft. The court did not so find and appellant's brief is in error in stating that such a finding was made. The record will substantiate the court's lack of confidence in the testimony of the appellant in this and other respects. (See appellee's prior brief filed November 16, 1956, pages 7 through 21, inclusive.) California Insurance Code, Section 286, provides, in part, as follows:

"An interest in property insured must exist when the insurance takes effect, and when the loss occurs
* * *".

As found by the trial court, appellant made false statements which voided the policy. The insurance policy provides:

"This entire policy shall be void if the assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud, attempted fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

In the case of *C.I.T. Corporation v. American Central Ins. Co.*, 18 Cal. App. 2d 673, 64 P. 2d 742, the court sets

forth the California rule on the effect of a false statement under oath made by the insured as follows:

“The defendant’s sworn statement was, therefore, false, and its effect was to avoid the policy irrespective of its materiality. ‘A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy.’ (Civ. Code, Sec. 2611; *Victoria S.S. Co. v. Western Assurance Co.*, 167 Cal. 348, 139 P. 807. We have seen that the policy here considered provided that a false statement under oath, whether before or after a loss, would avoid it.” (P. 745.)

See also:

O’Connor v. Grand Lodge A. O. U. W., 146 Cal. 484, 80 Pac. 688;

Boyer v. United States Fidelity & Guaranty Co., 206 Cal. 273, 274 Pac. 56; and

Atlas Assur. Co. v. Hurst, 11 F. 2d 250.

(All of which cases are cited in Appellee’s Brief filed with this court on November 16, 1956, at pages 23 and 24).

The trial court’s award of attorneys’ fees was proper and modest. An award of \$1,500.00 was made although the appellee had requested the sum of \$2,925.00 supported with a detailed itemization of the work done, which was cut almost in half by the trial court in the exercise of its discretion. The award comes squarely within Rule 56(g) of the Federal Rules of Civil Procedure providing for such an award where affidavits “are presented in

bad faith". The award was based upon the fact that the appellant did act in bad faith in that he was knowingly untruthful in the presentation of his affidavit. The fact that the same evidence was later used at trial does not remove the fact that it was the filing of appellant's affidavits which caused appellee to incur the expense of obtaining affidavits and depositions to counter the false and fraudulent affidavit presented by appellant.

The trial court's findings that there had been no theft is thoroughly supported by the evidence and irrespective of any other considerations in the case if the jewelry which is the subject of the action was not stolen the insured would have no right of recovery against the insurance company. The court found as a fact that the jewelry was not stolen and that both the insured and his mother were guilty of fraud and false swearing in claiming that it had been stolen. This court has previously held that the lower court properly received evidence adequately supporting the finding that appellant was not worthy of belief.

In *Gale v. General Casualty Co. of America*, 120 F. 2d 925 (C. C. A. Cal.), the court states:

"Appellants contend that the court's finding of misrepresentation and concealment is not sustained by the evidence. On this issue appellants must show the court's findings are 'clearly erroneous', due regard being 'given the opportunity of the trial court to judge of the credibility of the witnesses . . . '".

A trier of fact may reject all of a witness' testimony if it is believed that the witness has wilfully and corruptly

sworn falsely to any material fact, and the testimony of one who has been found unreliable in one issue may properly be given little weight on other issues. (See *Liberty Mut. Ins. Co. v. Thompson*, 171 F. 2d 723, 726; *N.L.R.B. v. Pittsburgh S.S. Co.*, 337 U. S. 656, 69 S. Ct. 1283, 93 L. Ed. 1602.) The rule is codified in the California Code of Civil Procedure, Section 2061(3), as follows:

“That a witness false in one part of his testimony is to be distrusted in others.”

Conclusion.

Appellee respectfully submits that the issues in this case have previously been passed upon by this court, that the trial court followed the directions of this honorable court and that the judgment should, therefore, be sustained.

Respectfully submitted,

THOMAS P. MENZIES,

JAMES O. WHITE, JR.,

Attorneys for Appellee.

No. 15947 /

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

LAUNDRY, LINEN SUPPLY & DRY CLEAN-
ING DRIVERS, LOCAL 928, etc., et al.,
Respondents.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

FILED

JUN 12 1958

No. 15947

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LAUNDRY, LINEN SUPPLY & DRY CLEAN-
ING DRIVERS, LOCAL 928, etc., et al.,

Respondents.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

THOMAS J. McDERMOTT,
Assoc. General Counsel,
National Labor Relations Board,
Washington 25, D. C.,
For the Petitioner.

STEVENSON & HACKLER, by
CHARLES K. HACKLER,
846 So. Union Ave.,
Los Angeles, Calif.,
For the Respondents.

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United States of America
Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CC-238

LAUNDRY, LINEN SUPPLY & DRY CLEAN-
ING DRIVERS LOCAL No. 928, Affiliated
With INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, AFL-CIO; and LOCAL No. 52, LAUN-
DRY & DRY CLEANING WORKERS IN-
TERNATIONAL, AFL-CIO,

and

SOUTHERN SERVICE COMPANY, LTD.

COMPLAINT

It having been charged by Mrs. Edwin Selvin, Labor Relations Consultant, acting for and on behalf of Southern Service Company, Ltd. (herein called Southern), that Laundry, Linen Supply & Dry Cleaning Drivers Local No. 928, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (herein called Teamsters); and Local No. 52, Laundry & Dry Cleaning Workers International, AFL-CIO (herein called Laundry Workers), have engaged in and are engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended. Public Law 101, 80th Congress,

First Session, herein called the Act; the General Counsel of the National Labor Relations Board, by the Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

1. Southern is a corporation organized and existing by virtue of the laws of California with its principal office in the City of Pomona, California, engaged in the laundry, dry cleaning and linen service business, operating various plants and establishments throughout Southern California, including one at Long Beach, California, under the fictitious name and style of Long Beach Linen Supply.

2. In the year 1955, Southern has purchased and caused to be shipped from points in states other than the State of California, to its establishments within the State of California, supplies and materials of a value in excess of \$500,000.

Southern is engaged in interstate commerce within the meaning of Section 2 (6) of the Act.

3. Respondents Teamsters and Laundry Workers are labor organizations within the meaning of Section 2 (5) of the Act.

4. In the course and operation of its business as set forth above, Southern regularly furnishes laundry and linen service and other services to customers, including Madsen's Restaurant, 1 American Avenue; Grisinger's Drive-Ins, 1632 Fourth

Street, and corner Atlantic Avenue and San Antonio Drive; and Jack's Corsican Room, 5430 East Second Street, all located at Long Beach, California.

5. Since prior to August 1, 1956, Respondents Teamsters and Laundry Workers have demanded that Southern recognize them as the collective bargaining representative of the employees of its Long Beach, California, plant.

6. Since on or about August 13, 1956, Respondents Teamsters and Laundry Workers, by their officers, agents and representatives, have picketed at various times, including but not limited to August 13 through August 17, and October 8 through the present, the premises of various customers of Southern, located in Long Beach, including but not limited to Madsen's Restaurant, Grisinger's Drive-Ins and Jack's Corsican Room, which picketing has included the entrances to the premises of the above-named employers used by employees of the above-named employers and employees of suppliers of the above-named employers, with picket signs carrying the following legend over Respondents' names:

Notice to the Public
This Establishment's Linens
Are Being Processed by a
Nonunion Laundry

7. By their picketing as set forth in paragraph 6 above, Respondents have engaged in and are en-

gaging in inducement or encouragement of employees of customers of Southern, including but not limited to Madsen's Restaurant, Grisinger's Drive-Ins and Jack's Corsican Room, and of their suppliers, shippers, wholesalers, transportation and delivery companies, to engage in strikes or concerted refusals in the course of their employment to perform services for their respective employers with the object of forcing and requiring customers of Southern, including but not limited to Madsen's Restaurant, Grisinger's Drive-Ins and Jack's Corsican Room, to cease using the products and services of Southern and to cease doing business with Southern and to force or require Southern to recognize or bargain with Respondents Teamsters and Laundry Workers as collective bargaining representative of Southern's Long Beach employees, although neither of the Respondents has been certified as such representative under the provisions of Section 9 of the Act.

8. By the acts and conduct as set forth above in paragraphs 6 and 7, and by each of them, Respondents Teamsters and Laundry Workers have violated and are now violating Section 8 (b), subsections (4) (A) and (B) of the Act.

9. The activities of the Respondents as set forth in paragraphs 5, 6, 7 and 8 above, and each of them, occurring in connection with the operations of Southern as set forth in paragraphs 1 and 2 above, have a close, intimate and substantial relation to

trade, traffic and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

10. The activities of Respondents Teamsters and Laundry Workers as set forth in paragraphs 5, 6, 7 and 8 above, and each of them, constitute unfair labor practices affecting commerce within the meaning of Section 8 (b), subsections (4) (A) and (B), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, this 13th day of November, 1956, issues this Complaint against Laundry, Linen Supply & Dry Cleaning Drivers Local No. 928, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO; and Local No. 52, Laundry & Dry Cleaning Workers International, AFL-CIO, Respondents herein.

[Seal] /s/ HENRY W. BECKER,
Regional Director, National Labor Relations Board,
Twenty-First Region.

Received in evidence as General Counsel's Exhibit No. 1-C, December 17, 1956.

United States of America
Before the National Labor Relations Board
Twenty-First Region

[Title of Cause.]

ANSWER

Respondent Locals 928 and 52 answer the Complaint as follows:

I.

Deny paragraphs 5, 7, 8, 9 and 10.

II.

Are without knowledge as to paragraphs 1 and 2 and on this ground deny them.

III.

Explain paragraph 6 as follows:

That they have for a number of years carried on a campaign to increase the usage of linen supply services of unionized laundries in order to increase the commission earnings of members of Laundry Drivers and to increase the employment opportunities of members of Laundry Workers. From time to time in the past several years, the two (2) Respondent Unions have engaged in peaceable picketing at the customer entrances of various restaurants and other retail establishments for the purpose of addressing an appeal to prospective customers to refrain from patronizing establishments using linen services furnished by nonunion laundries.

At various times on and after August 13, 1956, Respondents have caused the customer entrances

of Long Beach restaurants, including Madsen's Restaurant, Grisinger's Drive-In Restaurants, and Jack's Corsican Room, to be picketed by pickets carrying a sign substantially as alleged in this paragraph of the petition. Respondents are without knowledge as to whether the picketed customer entrances of the last named concerns are or were used by any persons other than the patrons of the restaurants, but assert that the sole and only appeal authorized by Respondents and carried out by their pickets has been an appeal to the owners and prospective customers. At no time have Respondents, directly or indirectly, sought to or have they or their pickets induced or encouraged the employees of said restaurants, delivery men seeking to deliver merchandise to said restaurants or the employees of any employer, to strike or refuse to perform any services in the course of their employment. Respondents deny that the picketing of the aforesaid restaurants was or is being conducted for the purpose of compelling Southern to recognize and bargain with them as the representative of Southern's Long Beach employees.

STEVENSON & HACKLER,

By /s/ CHARLES K. HACKLER,
Counsel for Respondents.

Duly verified.

Received November 27, 1956.

Received in evidence as General Counsel's Exhibit No. 1-F, December 17, 1956.

United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Branch Office
San Francisco, California

[Title of Cause.]

PAUL E. WEIL, ESQ.,
For the General Counsel.

MRS. EDWIN SELVIN, of
Beverly Hills, Calif.,
For Southern.

STEVENSON AND HACKLER, by
CHARLES K. HACKLER, ESQ., of
Los Angeles, Calif.,
For the Respondents.

Before:

WALLACE E. ROYSTER, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon a charge duly filed by Mrs. Edwin Selvin in behalf of Southern Service Company, Ltd., herein Southern, the General Counsel of the National Labor Relations Board, herein the Board, issued his complaint against Laundry, Linen Supply & Dry Cleaning Drivers Local No. 928, affiliated with International Brotherhood of Teamsters, Chauff-

feurs, Warehousemen and Helpers of America, AFL-CIO; and Local No. 52, Laundry & Dry Cleaning Workers International, AFL-CIO, herein the Respondents, alleging that they had violated and were violating Section 8 (b) (4) (A) and (B) of the National Labor Relations Act, 61 Stat. 136, herein the Act.

In respect to unfair labor practices, the complaint alleges that for a period in August, 1956, and since October 8 of that year the Respondents, by means of picketing, have induced and encouraged employees of customers of Southern and of suppliers to those customers to engage in strikes or concerted refusals in the course of their employment to perform services for their respective employers with the object of forcing and requiring such customers to cease using the services of Southern and to cease doing business with Southern and to force or require Southern to recognize or bargain with the Respondents as collective bargaining representative of certain of Southern's employees, although neither respondent has been certified as such representative pursuant to Section 9 of the Act.

Respondents' answer denies the commission of unfair labor practices, denies that it has demanded recognition of Southern, and asserts that the picketing had the sole purpose of inducing customers to refrain from patronizing certain restaurants in the Long Beach area.

Pursuant to notice a hearing was held before the undersigned in Los Angeles, California, on

December 17, 1956. All parties were represented and were permitted to examine and cross-examine witnesses and to offer evidence pertinent to the issues. No witnesses were called. The entire record consists of the transcript of testimony and exhibits offered and received in an action under Section 10 (1) of the Act in the United States District Court, Southern District of California, Central Division, on November 26, and December 3, 1956. The General Counsel and counsel for the Respondents presented argument on the record.

On the basis of the entire record in the case and in the light of the arguments advanced, I make the following:

Findings of Fact

I. The Business of Southern

The parties stipulated and I find that Southern is a California corporation with main offices in Pomona, California, operating approximately 30 laundries throughout California, including one in Long Beach called Long Beach Linen Supply. In 1955 Southern purchased and caused to be shipped to it from points and States other than the State of California linens, laundry, and dry cleaning supplies and equipment valued between \$500,000 and \$600,000. Because the picketing affected only a few of Southern's customers, Respondents argue that had it been completely successful and had Southern been deprived of the trade of these customers, the overall effect upon Southern's business would have

been so slight as to call into play the rule of de minimus. This argument is rejected. If Respondents' conduct, detailed below, was unlawful in terms of the Act and successful the anticipated effect upon the business of Southern in all its branches could be expected to have a substantial impact upon commerce.

II. The Function of the Respondents

Both Respondents are labor organizations, admitting to membership certain classifications of employees performing work for Southern.

III. The Alleged Unfair Labor Practices

For a number of years the Respondents have made unsuccessful attempts to organize employees of Southern, but at the time of the picketing, described below, no recent demand for recognition had been made upon Southern. Except to the extent that Southern's employees may have regarded the picketing of Southern's customers as inducement to join one of the Respondents, no active current organizing campaign is in effect.

Learning in late spring or early summer of 1956 that the State convention of the American Federation of Labor was scheduled to be held in Long Beach, the Respondents protested to the Central Labor Council in Long Beach that such a gathering of union officials would result in a substantial increase of business to employers in the area who were using the nonunion service of Southern. When

their protests did not succeed in having the convention moved to another city, the Respondents told representatives of Long Beach restaurants and officials of other labor organizations that for the period of the convention, pickets would be placed outside some or all restaurants in the area using Southern's linen service to advertise that fact and thus to encourage the visiting union representatives to refrain from patronizing such restaurants. In the meantime efforts were made to persuade Long Beach restaurants to switch their custom to linen service companies employing members of the Respondents. For the period of the convention, August 13 through 18, pickets were placed outside the customers entrances to about 15 Long Beach restaurants. The pickets each carried the following sign:

Notice to the Public. This Establishment's Linens
Are Being Processed by a Nonunion Laundry

All but four of the restaurants picketed had a separate entrance for employees and suppliers. No pickets were placed at such entrances. Madsen's restaurants had but one entrance and a picket patrolled before it. The picket also, walked between a sidewalk opening, through which supplies were delivered, and the curb. At Grisinger's Drive-Ins at two locations the pickets patrolled the drive-in entrances through which customers and others gained access to the restaurants. At Jack's Corsican Room, a night club, the picket patrolled before the single

entrance. No complaint is made concerning the picketing of restaurants having a separate employee entrance.

At the four restaurants mentioned in the complaint picketing took place only during those hours when business was at its height; at usual meal times. No picketing was done at the earlier hours when employees of the restaurants were reporting for work.¹ Deliveries were received, however, at no certain hours and in consequence employees of suppliers approached the restaurant entrances on occasion when pickets were present. On the first day of picketing Harley Schaefer, an employee of an ice cream company prepared to make a delivery at Madsen's when a driver for a bakery company suggested that Schaefer might be fined by his union if he did so. Schaefer left without making delivery. He then inquired of his employer and was told that he could do as he liked. Going finally to the office of his union he was told by someone² that he should not cross the picket line. Later in the week, however, coming somehow to the conclusion that it was permissible to do so, Schaefer crossed the picket line to make a delivery. Henry Nieto coming to the same

¹Except perhaps at one of the Grisinger drive-in restaurants. Pickets appeared there at least on the first day of picketing before some of the employees reported.

²Schaefer testified that he spoke to a man who had died 2 months before his visit. I consider this to be an honest mistake on the part of Schaefer and find that he spoke to someone at that office.

restaurant with an order of meat asked the picket if the strike was "official." Receiving no answer, Nieto made his delivery in the normal fashion. Allen Russell, a driver for a meat company, seeing the pickets at one of the Grisinger restaurants, drove around the block and approached the delivery point from the rear. From there he signalled the cook who came to the truck to get the meat. Russell followed this practice for the time that the picket line existed. Russell testified that he had been driving but a short time, that he was unsure of any consequence which might follow crossing the line, that he made no inquiry concerning the matter of his union, and that he just decided that the safest course was the one he chose to pursue. Before the picketing, Russell had driven his truck through one of the driveways used by customers. No pickets were stationed in the rear where he made the deliveries mentioned above. Edward Graham, an employee at the Grisinger drive-in restaurant where Russell delivered, testified that drivers of other suppliers were deterred by the sight of the picket line and left without making delivery. This occasioned no more than delay, however, for the drivers later returned and crossed the picket line. No employee of any of the restaurants failed to report for work or failed in any respect to perform duties for his employer because of the picketing.

All picketing stopped on August 18 but was resumed at Madsen's on October 8 and was continuing at the time of the hearing.

The General Counsel sees the picketing as an attempt to force recognition from Southern by the device of inducing and encouraging employees of neutral employers to cease performing services for their several employers in order that pressure to accomplish that end be brought upon Southern. He suggests that picketing at Southern's premises might be permissible but that by doing so at the restaurants supplied by Southern, the Respondents have departed from an appropriate site to a forbidden one.³ Implicit in the General Counsel's reasoning is the assumption that any picket line maintained by a labor organization constitutes an inducement to members of labor organizations not to cross it for any purpose.

Counsel for the Respondents has a different view of the matter. He asserts that the picketing had for an objective only the apparent one of persuading customers by a truthful presentation of facts to withhold their patronage from the picketed restaurants.

The facts of the case are simple, are not disputed in any important respect, and have been stated.

The restaurant operators either were notified beforehand or learned during the week of August 13 that the picketing was not directed to their employees. All labor organizations whose members worked in the restaurants or for suppliers to the

³Local Union 984, etc., 116 NLRB No. 227 and Local 657, etc., 115 NLRB 981.

restaurants had been notified that this was purely and simply an appeal for a consumer boycott.⁴ None of the restaurant employees refused to perform services for their employers and the few incidents of delay in receiving supplies are clearly attributable to an assumption, not warranted in my opinion, that the picket line was to be observed by them.

Because the Respondents openly stated the purpose of the picketing before it started; because drivers who questioned the propriety of crossing the picket lines quickly satisfied themselves that observance was not required; because the hours of picketing were coincident with the hours of meal service rather than with the hours when employees report for work or the hours when supplies were received; because employee and supplier entrances, where they existed, were not picketed; and because the entire conduct of the Respondents in respect to the picketing is rationally consistent with an object to induce a consumer boycott only, I find that no violation of the Act, as alleged, is here presented. Because I do not find the evidence to support the General Counsel's contention that the picketing constituted inducement or encouragement of restaurant employees or of employees of restaurant suppliers, the cases he relies on dealing with "common situs" situations have no bearing here and are not discussed.

⁴I consider that the Respondents are not chargeable for the erroneous instruction given Schaefer by some one purporting to speak for his union.

By reason of the conclusions reached above, it is recommended that the complaint be dismissed.

Dated this 23rd day of January 1957.

/s/ WALLACE E. ROYSTER,
Trial Examiner.

United States of America
Before the National Labor Relations Board

[Title of Cause.]

DECISION AND ORDER

On January 23, 1957, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, a copy of which Report is attached hereto, finding that the Respondents had not engaged and were not engaging in any unfair labor practices, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and

the entire record in the case, and hereby adopts the Trial Examiner's findings of fact, except insofar as inconsistent with this opinion. However, we find, contrary to the Trial Examiner, that these facts establish that the Respondents have violated Section 8 (b) (4) (A) of the Act.

As set forth in greater detail in the Intermediate Report, for a number of years the Respondents have unsuccessfully sought to organize Southern's employees. In furtherance of this campaign, the Respondents told local restaurant owners and a number of other unions in the area that restaurants which refused to change from Southern's linen supply service to a union linen supply service would be picketed. Thereafter, those restaurants which continued to patronize Southern were picketed by the Respondents with signs stating: 118 NLRB No. 193.

Notice to the Public

This Establishment's Linens Are Being Processed
By A
Nonunion
Laundry¹

The picket lines were withdrawn from those restaurants which agreed to change to a union linen service.

On these facts there can be no doubt, and the Respondents do not dispute, that an object of the

¹On December 5, 1956, the first line of the picket sign was changed to read "Notice to Patrons."

picketing was to force or require the restaurants to cease doing business with Southern. Nor is there any question that the Respondents sought to effectuate that object by means of picketing at the premises of secondary employers, the restaurants, and without regard to the presence or absence of Southern's employees, rather than by means of picketing at the premises of the primary employer, Southern.² It is well settled that picketing directed to employees at such locations violates Section 8 (b) (4) (A) of the Act.³ However, the Respondents contend, and

²The Respondents' contention that the picketing was carried on partly in furtherance of a primary labor dispute with the restaurants, on the ground that the Respondents sought to obtain bonuses for the driver-salesmen working for unionized linen services by inducing the picketed restaurants to give them new business, is plainly without merit. It is patent from the record that the Respondents did not represent nor seek to represent the employees of the restaurants. *Fehr Baking Co. v. Bakers' Union*, 20 F. Supp. 691, 692-694, 696 (W. D. La.); *Bright v. Pittsburgh Musical Society*, 108 A. 2d 810, 813-814, 379 Pa. 335. Rather, the Respondents' contention constitutes further evidence that its object was to compel the restaurants to cease doing business with Southern, as prescribed by Section 8 (b) (4).

³*Truck Drivers & Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL (National Trucking Co.)*, 111 NLRB 483, enforced, 228 F. 2d 791 (C.A. 5); *Commission House Drivers, Helpers and Employees Local No. 400, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (Euclid Foods Incorporated)*, 118 NLRB No. 17; and cases cited therein.

the Trial Examiner found, that such picketing did not constitute inducement or encouragement of employee action, within the meaning of Section 8 (b) (4), but rather looked only to persuading customers by a truthful presentation of facts to withhold their patronage from the picketed restaurants. We do not agree.

The picketing at Madsen's Restaurant and at the 2 Grisinger Drive-Ins took place at entrances normally used by restaurant employees and employees of suppliers, as well as by patrons of the restaurants. This required the restaurant employees to work behind the picket lines and employees of suppliers to cross the picket lines in order to make deliveries. But as we have repeatedly pointed out, such a picket line necessarily invites employees to refrain from working behind it irrespective of the literal appeal of the legends on the picket signs.⁴ That such is the understanding of employees confronted with a picket line is shown by the response to the pickets set up by the Respondents here. Although the words on the picket sign did not request any employees to cease work, some of the restaurant employees and deliverymen made in-

⁴Dallas General Drivers, Warehousemen & Helpers, Local No. 745, AFL-CIO (Associated Wholesale Grocery of Dallas, Inc.), 118 NLRB No. 165; Knit Goods Workers Union, Local 155, International Ladies' Garment Workers' Union, AFL-CIO (James Knitting Mills, Inc.), 117 NLRB No. 196; Knitgoods Workers Union, Local 155 International Ladies' Garment Workers' Union, AFL-CIO (Packard Knitwear, Inc.), 118 NLRB No. 71.

quiries as to whether the signs so implied; several of the deliverymen delayed making their deliveries; one deliveryman, who testified, "As far as I know, I am not supposed to cross a picket line," refused to make his delivery, which the supplier later made by a special deliveryman; and another changed his method of making delivery, in part by requiring restaurant employees to pick up meat from his truck parked on the premises instead of bringing it into the restaurant himself, so as to avoid crossing the picket line. The unsuccessful efforts of one deliveryman who made his delivery, to find out from a picket and from his union whether "the strike" or 'this picketing' was official," indicate that if they were "official" he would not cross the picket line regardless of its ostensible purpose.⁵

For the foregoing reasons, we find that by picketing the restaurants of secondary employers at entrances customarily used by restaurant employees and employees of suppliers, for the purpose of forcing the restaurants to cease doing business with Southern, the Respondents induced and encouraged such employees to engage in a strike or a concerted refusal to work, and therefore violated Section 8 (b) (4) (A).⁶ The fact that the picketing

⁵We also note that 2 suppliers telephoned Grisinger that they could not make delivery because there was a picket line, and that 1 of them told Madsen that its employees did not want to cross that line.

⁶The General Counsel contends that the picketing also violated Section 8 (b) (4) (B) because it had

might also have had as an object an appeal to members of the consuming public cannot serve as a defense to conduct which also involved inducement of employee action with a proscribed object. Associated Wholesale Grocery, *supra*.

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Laundry, Linen Supply & Dry Cleaning Drivers Local No. 928, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO; Local No. 52, Laundry & Dry Cleaning Workers International, AFL-CIO; and their officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from inducing or encouraging employees of any employer, other than Southern

as an object forcing or requiring Southern to recognize and bargain with Respondents, which are not the certified representatives of Southern's employees. Since the Trial Examiner found that "no recent demand for recognition had been made upon Southern," to which finding the General Counsel does not except; since the record contains testimony which may amount to a denial of testimony by Southern's president that the Laundry Workers' secretary sought to "meet with" him; and since the order issued here will remedy any conduct violative of Section 8 (b) (4) (B), we shall dismiss that portion of the complaint without passing on its merits.

Service Company, Ltd., to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Southern Service Company, Ltd., or to cease doing business with that company.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at their offices and meeting halls in Long Beach, California, copies of the notice attached hereto as an appendix.⁷ Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondents' representatives, be posted by them immediately upon receipt thereof, and be maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to their members are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material;

⁷In the event this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "Pursuant to a Decision and order," the words "Pursuant to a decree of the United States Court of Appeals, Enforcing an Order."

(b) Mail to the Regional Director for the Twenty-first Region signed copies of the notice attached hereto as an appendix for posting at the following restaurants in Long Beach, California, in places where notices to their employees are customarily posted, if the owners of such restaurants are willing to do so: Madsen's Restaurant; Grisinger's Drive-In Restaurant at 4390 Atlantic Boulevard; and Grisinger's Drive-In Restaurant at 1632 East Fourth Street;

(c) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days from the date of this Order as to what steps it has taken to comply herewith.

It Is Further Ordered that the complaint be, and it hereby is, dismissed insofar as it alleges that Respondents have violated Section 8 (b) (4) (B) of the Act.

Dated, Washington, D. C., Sept. 25, 1957.

[Seal]

NATIONAL LABOR
RELATIONS BOARD,

.....,
PHILIP RAY RODGERS,
Member;

.....,
STEPHEN S. BEAN,
Member;

.....,
JOSEPH ALTON JENKINS,
Member.

Appendix

Notice to Members and All Employees
Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members and all employees that:

We Will Not induce or encourage employees of any employer other than Southern Service Company, Ltd., to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Southern Service Company, Ltd., or to cease doing business with that company.

LAUNDRY, LINEN SUPPLY & DRY CLEAN-
ING DRIVERS LOCAL No. 928, Affiliated
With INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN & HELPERS OF AMERICA,
AFL-CIO,

(Labor Organization.)

Dated.....

By,
Representative.

LOCAL No. 52, LAUNDRY & DRY CLEANING
WORKERS INTERNATIONAL, AFL-CIO,
(Labor Organization.)

Dated.....

By,
Representative.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CC-238

LAUNDRY, LINEN SUPPLY & DRY CLEAN-
ING DRIVERS LOCAL No. 928, Affiliated
With INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, AFL-CIO; and LOCAL No. 52, LAUN-
DRY & DRY CLEANING WORKERS IN-
TERNATIONAL, AFL-CIO,

and

SOUTHERN SERVICE COMPANY, LTD.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California—December 17, 1956.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

Before: Wallace E. Royster,
Trial Examiner.

Appearances:

PAUL E. WEIL, ESQ.,
111 West Seventh Street, Los Angeles,
California, Appearing on behalf of the
General Counsel.

MRS. EDWIN SELVIN,
2640 Benedict Canyon Drive, Beverly
Hills, California, Appearing on Behalf
of Southern Service Company, Ltd.

STEVENSON & HACKLER, by
CHARLES K. HACKLER, ESQ.,
846 South Union Avenue, Los Angeles,
California, Appearing on Behalf of
Locals Nos. 928 and 52.

* * *

Mr. Weil: Mr. Examiner, pursuant to agreement with respondent's counsel, I would like to offer as General Counsel's Exhibit 2, four various bound documents, which are Vols. I and II of the Reporter's Transcript of Proceedings in case No. 20668 WB Civil before the United States District Court, Southern District of California, Central Division, Honorable William M. Byrne, Judge Presiding, which was the injunction proceeding in the instant case.

I wish to offer the transcript, Volumes I and II, Petitioner's Exhibits 1 through 6, and Respond-

ent's Exhibits A through K, which formed the entire and complete transcript of the proceedings before the Court.

Trial Examiner: That is the entire record?

Mr. Weil: That is the entire record.

Trial Examiner: Do you join in that request for admission, Mrs. Selvin?

Mrs. Selvin: Yes.

Mr. Hackler: So do I.

Trial Examiner: General Counsel's Exhibit 2 is received as offered.

(Thereupon the documents above referred to were marked General Counsel's Exhibit No. 2 for identification and received in evidence.)

Mr. Weil: Furthermore, in agreement with counsel, I wish to offer a stipulation that the picket sign which was alleged in the complaint to read "Notice to the Public," and "This establishment's linens are being processed by a nonunion laundry," carried precisely that language until December 5, 1956, on which date the picket sign was changed to read "Notice to Patrons. This establishment's linens are being processed by a nonunion laundry."

Trial Examiner: Agreeable.

Mr. Hackler: So stipulated.

Trial Examiner: Do you join in that?

Mrs. Selvin: Yes.

Trial Examiner: The stipulation is noted.

Mr. Weil: General Counsel has no other further or additional evidence he wishes to offer at this time and therefore rests.

Trial Examiner: Do you have anything to offer?

Mrs. Selvin: No.

Trial Examiner: Anything, Mr. Hackler?

Mr. Hackler: I have nothing further to offer other than to see that the record is clear that we are stipulating that the transcript may be considered by the Trial Examiner as if the same witnesses were sworn, examined, cross-examined, as indicated in the transcript, and the same exhibits identified and received, and, so far as I know, I have no further objections to make other than those that were made and I am willing to abide by the rulings of the District Judge.

Trial Examiner: Is that your understanding?

Mr. Weil: Yes.

Mrs. Selvin: Yes.

Mr. Hackler: We are offering it in lieu of testimony and exhibits on both sides.

Trial Examiner: All right.

Mr. Hackler: So stipulated.

Mr. Weil: So stipulated.

Mr. Hackler: We have nothing further to offer.

* * *

Received December 31, 1956.

GENERAL COUNSEL'S EXHIBIT No. 2

In the United States District Court, Southern
District of California, Central Division
No. 20668-WB

HENRY W. BECKER, Regional Director of the
Twenty-First Region of the National Labor Re-
lations Board, for and on behalf of the Na-
tional Labor Relations Board,

Petitioner,

vs.

LAUNDRY, LINEN SUPPLY & DRY CLEAN-
ING DRIVERS LOCAL No. 928, Affiliated
with International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of
America, AFL-CIO; and Local No. 52, Laundry
& Dry Cleaning Workers International, AFL-
CIO,

Respondents.

Honorable William M. Byrne, Judge, Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California—Monday, Nov. 26, 1956

* * *

Mr. Weil: * * * I wish at this time, your Honor,
to propose the following stipulation, which counsel
for respondents has agreed upon with me.

May it be stipulated that Southern Services, Inc.,
a California corporation with its main offices in

General Counsel's Exhibit No. 2—(Continued)

Pomona, California, operating some 30 laundries throughout California, including one in Long Beach, California under the name and style of Long Beach Linen Supply, purchased and caused to be shipped to it from points and states other than the State of California, in the year 1955, linens, laundry and dry cleaning supplies and equipment valued between \$500,000 and \$600,000?

This stipulation is without prejudice to respondents contending that the alleged unfair labor practices do not affect commerce within the meaning of the Act, or prevent the offering of additional noncontradictory evidence on the [9*] subject of commerce.

Mr. Hackler: So stipulated. [10]

* * *

CHARLES R. GOLDSTEIN

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: Charles R. Goldstein.

Direct Examination

By Mr. Weil:

Q. Mr. Goldstein, what is your address?

A. 10027 Roxbury Place, Los Angeles.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

Q. Are you the Charles Goldstein who is the secretary of Local 52 of the Laundry & Dry Cleaning Workers? A. I am.

Q. As secretary of Local 52, are you on the editorial board of the publication of Local 52, which is known as Local 52? A. Yes, sir.

Q. What are your duties on that editorial board, Mr. Goldstein?

A. I assist the editor in composing the paper, more in an advisory capacity. I don't write the editorials myself.

Q. Is the matter contained in that paper the position of the union, of the local?

A. Yes, sir. [15]

The Clerk: Petitioner's Exhibit 1 marked.

(The exhibit referred to was marked as Petitioners' Exhibit No. 1 for identification.)

Q. (By Mr. Weil): Showing you Petitioner's Exhibit 1, Mr. Goldstein, I will ask you if that is a copy of one issue of that paper of Local 52?

A. It is.

Q. Do you know whether that issue was distributed at about the time which appears on the upper right-hand corner of the first sheet, in other words, August and September, 1956?

A. That was the date that the paper was issued.

Q. Mr. Goldstein, has Local 52 been carrying on an organizing drive at Southern Services during the last year? A. An organizing drive?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

Q. Yes.

A. With the employees of the Southern Services?

Q. Yes, that's right. A. No, sir.

Q. It has not? A. No, sir.

Q. I will ask you to refer to the headline immediately below the picture appearing on the issue of the Local 52 paper which you have in your hand, Petitioner's Exhibit No. 1, and ask you to what that headline refers. [16]

A. I think this refers to our advertising picket program.

Mr. Weil: Your Honor, I would like to offer Petitioner's Exhibit No. 1 in evidence at this time.

The Court: It will be received.

(The exhibit referred to was received in evidence and marked as Petitioner's Exhibit No. 1.)

PETITIONER'S EXHIBIT NO. 1

Vol. 10, No. 7—Los Angeles—Aug., Sept., 1956.

Local 52.

Laundry and Dry Cleaning Workers International Union.

Union Hits to Extend Laundry Workers 8-Hour Day.

Southern Service Organizing Drive Scores Big Advances.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

The Joint Teamsters, Laundry Workers, Engineers and Machinists organizing campaign on Southern Service Laundries paid big dividends during the recent State Federation of Labor Convention in Long Beach.

An intensified organizing drive was put on during the convention which moved an estimated \$10,000 worth of monthly business from Southern Service into union laundry and linen supply houses.

Delegates to the convention were apprised in advance by means of letters that hotels, motels, restaurants, etc., purchasing linen from anti-union chain firm would have advertising lines.

At the same time thousands of window cards were placed in firms purchasing their linens from union plants and delegates were urged to patronize them.

Miniature sewing kits asking delegates to help the four unions sew up Southern Service were distributed to delegates as well as a complete list of all firms owned by the Southern Service chain.

As a result of this determined effort, literally scores of barber shops, restaurants, bars, motels and other establishments using nonunion laundry and linen service moved their patronage to union firms.

Spokesmen for the four unions declared that the drive was being continued after the convention and

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

would not be discontinued until union wages, hours and working conditions were won for the people employed by Southern Service plants.

Q. (By Mr. Weil): Has Local 52 engaged in a campaign at any time to organize any of the employees of Southern Services?

A. Yes, some time back in 1939 and intermittent periods since that time, but nothing in the last year that I recall.

Q. Was there any organizing attempt since 1950?

A. Well, there could have been.

Q. Have you been connected with Local 52 since 1950? A. Yes.

Q. At all times? A. Yes.

Q. Have you been the secretary of Local 52 during all that time? A. Yes, sir.

Q. If Local 52 had engaged in an organizing campaign during that time, would you have been aware of the fact? A. Oh, yes.

Mr. Hackler: Just a moment, Mr. [17] Goldstein.

I object to the use of the words "organizing campaign" as entirely too vague and uncertain as to what counsel means.

He could ask him what they may have done.

The Court: The objection is overruled. He has answered. He apparently understands what it means.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

You can clear it up on cross-examination.

The Clerk: Petitioner's Exhibit No. 2.

(The exhibit referred to was marked as Petitioner's Exhibit No. 2 for identification.)

Q. (By Mr. Weil): Showing you Petitioner's Exhibit No. 2 for identification, Mr. Goldstein, is that one of the issues of Local 52's newspaper?

A. It is.

Q. Can you tell me whether that issue was distributed on or about June, 1954, the date which it bears?

A. Distributed to what people?

Q. To any people.

A. This paper is only distributed to our membership.

Q. Well, was the paper distributed to your membership on or about the date which it bears?

A. Yes, I would say so.

Mr. Weil: I would like to offer Petitioner's Exhibit 2 for identification at this time, your Honor.

Mr. Hackler: No objection.

The Court: It will be received. [18]

(The exhibit referred to was received in evidence and marked as Petitioner's Exhibit No. 2.)

The Clerk: Petitioner's Exhibit 3.

(The exhibit referred to was marked as Petitioner's Exhibit No. 3 for identification.)

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

Q. (By Mr. Weil): Showing you Petitioner's Exhibit 3 for identification, Mr. Goldstein, was that an issue of the Local 52 newspaper? A. Yes.

Q. Can you tell me whether that issue of the newspaper was distributed to your members on or about October, 1952, the date which it bears?

A. I would say so.

Mr. Weil: I would like to offer Petitioner's Exhibit No. 3 for identification in evidence.

Mr. Hackler: No objection.

The Court: It will be received.

(The exhibit referred to was received in evidence and marked as Petitioner's Exhibit No. 3.)

Q. (By Mr. Weil): Mr. Goldstein, are you also secretary of an organization known as the Southern Service Organizing Committee?

A. I am the officer of this committee. I am the committeeman.

Q. Are you the secretary? [19]

A. Yes, sir.

Q. Tell me who comprises—who are the members of this committee?

A. Well, I just can't tell you offhand. I would have to see the literature, because there has been some changes I think.

The Clerk: Petitioner's Exhibit No. 4.

(The exhibit referred to was marked as Petitioner's Exhibit No. 4 for identification.)

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

Q. (By Mr. Weil): Can you tell me, Mr. Goldstein, when the Southern Service Organizing Committee was first organized?

A. That would be difficult for me to say. It is organized and has been organized, but when, I just cant' say.

Q. Was it within the last year?

A. We have had the Southern Service Organizing Committee, I would say, probably two or three years.

Q. Is Local 52 a member of that committee?

A. Yes, sir.

Q. Is the Laundry & Dry Cleaning Drivers Local No. 928 a member of that committee?

A. They are.

Q. Handing you Petitioner's Exhibit No. 4 for identification, I will ask you to look at that, Mr. Goldstein; is that a letterhead of the organizing committee? [20]

A. It is.

Q. Was that letter distributed by the organizing committee?

A. Yes, it could have been, yes.

Q. Do you know whether it was?

A. No, I can't say for sure, but I think it was.

Q. Who in the organizing committee has the authority to make up and distribute letters such as that?

A. The committee itself. It wouldn't be any one individual.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

Q. Do you mean any member of the committee?

A. Any one of the group.

Q. What group?

A. The ones that are affiliated with the committee, Teamsters, or the Engineers, the Laundry Workers; it all depends who the circular would be referred to.

Q. Mr. Goldstein, you will note a list of unions on the side of that document. A. Yes.

Q. Are those all of the present constituent members of that committee? A. Yes, sir.

Q. Can you tell me why the committee was formed?

A. Well, this committee has been formed—we have had committees on and off since 1942 that I know of. [21]

Q. Can you tell me why the committee was formed?

A. It was formed for the purpose of organizing the Southern Service Laundries.

Q. And what do you mean by organizing the Southern Service Laundries?

A. To have the people affiliate with our organizations.

Q. Do you mean to cause the employees of Southern Services to join the constituent unions on that committee? A. Of course. [22]

* * *

Q. By Mr. Weil: Mr. Goldstein, was the or-

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

ganizing committee formed in order to organize the employees at Southern Service?

A. Of course. [24]

* * *

Mr. Weil: I offer Petitioner's Exhibit 4 for identification.

Mr. Hackler: No objection.

The Court: It will be received.

(The exhibit referred to was received in evidence and marked as Petitioner's Exhibit No. 4.)

* * *

Cross-Examination

By Mr. Hackler: [25]

* * *

Q. Did you have anything to do with formulating that program of customer advertising?

A. Yes, sir.

Q. Just tell the court briefly how that came about, if there was some committee you dealt with or where the program started.

A. The way that came about, we had an experience with a laundry here in the city, I think it was the Bristol Laundry, as I recall, and we organized their people, and they threatened to discharge their people, and we were fearful of taking them out on strike because of that, so we proceeded on this program of publicizing the various agencies

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

that they serve. We started out with little cards. We said, "This establishment's laundry is being serviced by a nonunion establishment." They were small cards. We started that back in '45 or '44, I don't recall.

Q. Where was that card distributed?

A. Well, it was distributed in the front of the establishment. [26]

* * *

Q. Mr. Goldstein, you were asked several questions here about whether you had attempted any organizing campaign at various times involving the Southern Services Laundry; you are familiar in a general way with that laundry and its various affiliates, is that correct? A. I am.

Q. You understand it has some 30 separate laundries [31] scattered over Southern California, from San Diego on upwards of here? A. Yes.

Q. And it is to your knowledge a nonunion laundry, is it not? A. That's right.

Q. Is it one of the larger nonunion laundries remaining in the area?

A. Well, I think it is the largest. I am not sure, but I think it is.

* * *

Q. With respect to the organizing campaign that counsel asked you about, I want to call your attention, again, to these publications of your union; I take it that these publications that he identified,

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

they are Petitioner's Exhibits 1 [32] and 2 and 3, that those go to your members, is that correct?

A. That's right.

Q. As a part of their membership they get a copy of the periodic publication of the union?

A. That's right.

Q. Are they distributed other than to unions?

A. I doubt it. I don't think so. It may have been a few years back, but I doubt it.

Q. Actually, as a part of the man's membership, he goes on the mailing list for the publication called Local 52, does he not?

A. That is right. We have over 5,000 members, and we only print about 5,000.

Q. I would like to call your attention to certain things in these publications, starting with Petitioner's 1. I direct your attention in Petitioner's 1 to the article in the center of the page. First I will ask you, that bears the date of August-September, 1956?

A. Yes.

Q. Is it a fact that this publication came out after the recent picketing that was carried on in Long Beach during the Federation convention there?

A. I took sick about that time, so I can't say for sure, but it may have.

Q. All right. Let me ask you this: I want to direct [33] your attention to the following words appearing in the third paragraph of that article—

A. Is that on the first page?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

Q. Yes, bottom of the page, where it reads, "Delegates to the convention were apprised in advance by means of letters that hotels, motels, restaurants, et cetera, purchasing linen from anti-union chain firm would have advertising lines."

Does that have reference to the advertising picket line you have been describing to us?

A. That's right.

Q. And to your knowledge is that a true statement, that delegates to the convention and their unions were told in advance that this kind of an advertising picket line would be placed by your union at restaurants in the Long Beach area?

A. That is a true statement.

Q. Was it your purpose in so doing to inform them as prospective patrons, that is, the delegates to the convention, that these particular restaurants were not 100 per cent unionized?

A. That's right.

Q. Reading from the same article, it states:

"At the same time, thousands of window cards were placed in firms purchasing their linens from Union plants and delegates were urged to patronize [34] them."

To your knowledge, was that done prior to the convention?

A. I can't say, because I took sick, but that was part of the program, we were going to have these signs printed, so these establishments, those that were serviced by union operators, would be distin-

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

guished from those that are not being serviced by union operators, so the delegates can give their patronage to these establishments.

* * *

Q. Drawing your attention now to Petitioner's Exhibit 2, which is an issue of your local paper, bearing the date of June, 1954, I want to call your attention to the fifth paragraph of that article—strike that—to the fourth paragraph [35] where it says:

“Secretaries of the two locals report that the drive will be particularly directed at Southern Service Laundries which operate in the Los Angeles area as Blue Bird and Blue Seal and in Long Beach as Marine and Ideal Laundries. This corporation, they report, is the last major non-union hold-out in Southern California.”

To your knowledge, that is a true statement, is it?

A. That is true. [36]

* * *

Q. What establishments was it determined to place the pickets at?

A. Advertising pickets?

Q. Yes.

A. The establishments that are being serviced by the Southern Service Linen Supply Company.

* * *

Q. Is it true that before the coming of the con-

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

vention, that your union and the Teamsters' laundry drivers local protested the bringing of the convention to Long Beach?

A. That is true.

Q. Where did you make that protest?

A. That protest was made to the State Federation of Labor.

Q. What was the ground of your protest?

A. That a number of these establishments were being serviced by the Southern Service, and we felt that the State Federation of Labor should be brought to some other city than Long Beach because of it. [44]

Q. Did you also protest to the Central Labor Council of Long Beach against bringing the convention there?

A. That's right.

Q. I take it the convention was held, nevertheless, was it not?

A. That's right.

* * *

Q. Were a number of these restaurants that were to be picketed, and were picketed, were they under contract, so far [45] as their own employees, to the Bartenders Union and the Culinary Union?

A. Oh, yes, most of them I would say. [46]

* * *

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Charles R. Goldstein.)

Redirect Examination

By Mr. Weil: [49]

* * *

Q. Isn't it a fact that the campaign at the present time is directed solely at Southern Service?

A. At the present time I would say yes. [51]

* * *

LOUIS MADSEN

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please, and give us your full name.

The Witness: Louis Madsen.

* * *

Direct Examination

By Mr. Weil:

Q. Give us your address, please.

A. No. 1 American Avenue.

Q. What is located at that address?

A. At Long Beach. A restaurant.

Q. Do you operate this restaurant?

A. I do.

Q. Would you describe that restaurant, please, the [55] situation on the corner?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Louis Madsen.)

A. It is situated on the corner of Ocean Boulevard and American Avenue. There is approximately 38 feet on Ocean Boulevard and about 50 feet to 55 feet on American Avenue. The entrance is on the corner.

Q. What is behind your restaurant?

A. The restaurant is located inside the hotel, and the hotel lobby is on one side, and the hotel office is on the American Avenue side.

Q. Is there a direct entrance from the restaurant into the hotel?

A. There is a direct entrance—not from the restaurant, only from the street.

Q. Do you have any other doors other than the one on the corner?

A. We have a door on the American Avenue side, it is about approximately 45 to 50 feet from the corner, and that door is used for emergency in case of fire, and for removal of trash only.

Q. Are any deliveries of any type of goods made through that door?

A. No deliveries, no entrance or egress by employees.

Q. How are your deliveries of large materials made to your restaurant?

A. On the American Avenue side a short distance from [56] the corner there is a chute through the sidewalk. The deliveries are made through that chute.

Q. Is the chute covered?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Louis Madsen.)

A. The chute has a metal two-door cover. It has to be opened by hand.

Q. When the chute is closed, does that become part of the sidewalk then?

A. It is part of the sidewalk.

Q. Are all deliveries of all merchandise made through that chute?

A. All deliveries except small parcels.

Q. Where are small parcels delivered?

A. Through the front door.

Q. When a delivery is made through that chute, is there any occasion for the delivery man to come into the restaurant?

A. Yes, sir, he has to come into the restaurant to have the merchandise checked and the ticket signed for.

Q. What door does he use?

A. He uses the front door or climbs the ladder down the chute, on the side of the chute.

Q. Has your restaurant been picketed?

A. Yes.

Q. Can you tell me when your restaurant was picketed first?

A. It started—I don't remember the dates, but it [57] started early in August and has continued, except for recently, it has continued during meal times and not on holidays.

Q. What hours of the day, specifically, does the picketing take place now?

A. Monday through Friday.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Louis Madsen.)

Q. What hours of the day?

A. Usually between 8:00 and 9:30 in the morning, at 12:00 noon to 2:00 in the afternoon, and 5:00 to 6:00 in the evening.

Q. What route do the pickets walk, if they walk around your restaurant?

A. On American and Ocean Boulevards back and forth around the corner.

Q. Do they walk the full length of the restaurant on both streets?

A. Sometimes. I never checked that. I do know that the greater part, window part of the restaurant has been covered by the pickets.

Q. How far down on American Avenue do the windows go?

A. It goes about 38 to 40 feet.

Q. And on Atlantic?

A. About 20 to 22 feet—you mean Ocean Boulevard?

Q. I mean Ocean Boulevard. I am sorry. Are your employees represented by any union?

A. Yes, represented by the local Culinary Union in conjunction [58] with the Restaurant Association, of which we are a member.

* * *

Q. Do you have linen service supplied to your restaurant? A. Yes.

Q. By whom?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Louis Madsen.)

A. Southern Cross Service—no. Southern Service.

Q. For how long have you been getting your linens from Southern Service?

A. A little over four years.

Q. Have you had any conversations with any agents of either Local 52 of the Laundry Workers or Local 928 of the Teamsters Union?

A. I don't know what local they belong to. I had a conversation with one man, representing himself as Mr. Leggieri, who claimed he represented them, and I have had conversations with our own local representatives who asked me to change my service.

Q. Did Mr. Leggieri give you his card?

A. Yes.

Q. When was that conversation? [59]

A. That was the very latter part of July or early in August, prior to a union delegate convention that was being held in Long Beach.

Q. Where did this conversation take place?

A. In my restaurant on the main floor.

Q. Did anyone else take part in the conversation other than you and Mr. Leggieri?

A. No one else.

Q. Was there anyone else with either of you that would have been a part of the conversation or would have heard the conversation? A. No.

Q. Will you tell us what was said by both you and him during this conversation?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Louis Madsen.)

A. I was told to change to a union laundry or subject myself to being picketed. I was advised in the same conversation that if I am picketed, I will lose lots of revenue, because there is a local delegate convention coming into Long Beach and they will not cross a picket line. And I told him, in answer, that I am an American citizen, I still have a few rights, and I will exercise them to the best of my ability, and I will continue doing service with this particular laundry.

Q. Was there any more to the conversation that you can recall? [60]

A. Well, it was merely back and forth; him advising me to change because of the loss of revenue, and I told him that I would just have to stand the consequences.

Q. During the picketing of your restaurant, did the pickets walk across this chute on the sidewalk?

A. During the early stages of the picketing they walked very close to the window, within inches, back and forth, and around the corner, and couldn't help but walk over that chute.

Q. Has that changed?

A. The recent picketing has been limited to strictly on the sidewalk away from the building, a reasonable distance from the building.

Q. Does the recent picketing still cross in front of that chute, between that and the curb?

A. No, because the chute is close to the build-

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Louis Madsen.)

ing and the picket is walking several feet from the chute.

Q. Does the picketing cross between the chute and the curb? A. Yes.

Q. Does it continue on behind, northward from the chute toward the rear door of the entrance?

A. Yes.

Q. Did the picketing that was conducted have any effect on the inflow of supplies and materials to your restaurant [61] to your knowledge?

A. On several occasions it has.

Q. What effect did it have?

A. Well, I received calls from some of the purveyors telling me they cannot deliver because a picket is in front of our place.

Q. Can you tell me specifically what purveyors may have called you or did call you?

A. R. C. Griffith.

Q. What is R. C. Griffith?

A. It is a meat purveyor. Carnation Company, ice cream purveyor.

Mr. Hackler: What was the last?

(Record read by the reporter.)

Q. (By Mr. Weil): Do you recall any others?

A. Douglas Bros., although their delivery happened to have been made earlier before the picket got there, they called to ask me what it was all about, at the same time explaining to me that their

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Louis Madsen.)

drivers are union and they will not cross a picket line, if it is a picket line.

Mr. Hackler: May I have the last? I couldn't hear.

The Court: Keep your voice up. Read the answer.

(Answer read by the reporter.)

Q. (By Mr. Weil): Do your employees always come in the front door? [62] A. Yes.

Q. Are the pickets visible from inside the restaurant through your windows? A. Yes.

Q. Did the picketing have any influence on your employees, whether they came to work or not?

A. Yes, there are many questions——

Mr. Hackler: Objected to as calling for a conclusion of the witness. He can state what happened.

The Court: The objection is sustained. Reword it. He started to give you the proper answer, but technically the question is objectionable.

Q. (By Mr. Weil): Did any of your employees react to the picketing by not coming to work, or by coming to work late?

A. Yes. Some questioned whether they are permitted to come to work; others called the local to inquire whether this picket line barred them from entering my premises.

There were questions, also—whether this will be part of the answer, I don't know, but customers who came in were questioning why the place was

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Louis Madsen.)

picketed, when it was a union house, when all employees were union and the house establishment was union.

Mr. Weil: I have no further questions of this witness. [63]

Cross-Examination

By Mr. Hackler: [64]

* * *

Q. Does he still traverse the area of the sidewalk between the covering of the chute and the curbing, to your observation?

A. He crosses the—the curb is along here, and he crosses the area where if a delivery is being made he has to cross the picket line.

Q. As I understand it, the difference is he walked over the top of the chute before?

A. Originally they used to walk over.

Q. But now he walks out where the sun is showing here? [70] A. Yes.

Q. What direction is that?

A. Walking in this direction would be south, and walking in this direction would be north.

Q. Is it your testimony that he actually walks out on the sidewalk here but passed between the chute and the curb at the present time?

A. Yes. [71]

* * *

Q. (By Mr. Hackler): Going back, about how

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Louis Madsen.)

long before the picketing was it that Leggieri came to talk to you at your place of business?

A. It might have been a week or two weeks. I don't remember the date.

Q. You understood that similar visitations were made to other restaurants who were members of your Association, did you not?

A. They were made through our local union, our local Culinary Union advised us at that time, in view of the convention, union delegate convention coming to town, that we should change to a union laundry or subject ourselves to be picketed.

Q. But you learned not only from Leggieri, but also from the Culinary Union representing your own employees, in [74] advance of this picketing, that that picketing would likely take place if you didn't change your business to a unionized laundry; is that right?

A. That's right. [75]

* * *

Q. During this picketing, the first time during the convention, isn't it a fact that delivery men continued to use the chute in the sidewalk?

A. Yes.

Q. There wasn't a single delivery that didn't get delivered?

A. Yes, there was a single delivery that did not get delivered.

Q. Tell us about that, sir.

A. The Carnation Ice Cream Company driver

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Louis Madsen.)

tried to make a delivery; when he saw the picket line he turned around and brought the load back to the plant.

Q. Where would that normally have been delivered—through the chute or through the front door? A. Through the chute.

Q. Did the driver stop and get off, or see the picket and drive on?

A. This happened before I was there, and I can only go by the result, and that is I received a call from the company [86] manager telling me that the driver failed to make a delivery because of the picket line, and assured me that they will make a delivery somehow.

Q. Did they go ahead and make it?

A. They made the delivery.

Q. You told the Carnation Company that the picketing was not directed at stopping deliveries, did you not? A. Yes.

Q. Didn't you encourage them to verify that fact with the union?

A. Yes. By the same token, I encouraged R. C. Griffith to do the same thing, and they called the Central Labor Council—I am just repeating what one of their officials told me, that they cannot deliver unless they subject their drivers to a \$100 fine.

Q. That was some statement that was made by—

A. By a company official of R. C. Griffith.

Q. Of what some union official had told him?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Louis Madsen.)

A. That is right.

Q. Let's get back to the Carnation delivery. After you talked to the Carnation people and told them to verify your statements, did they go ahead and send the delivery back?

A. Yes, they sent the delivery.

Q. The same driver, as far as you know?

A. No. A special driver. [87]

* * *

Q. Any other deliveries of merchandise either through the chute or through the front door, or back door, that were either delayed or not delivered at all while this picketing was going on, either the first or second picketing?

A. We had a parcel coming from a Broadway store in Los Angeles, and the driver was looking for the rear entrance to the restaurant; he wouldn't deliver through the front door because there was a picket there, and I assured him that this was not a real strike picket, and he finally went over and talked to the picket man, and he made the delivery through the front door. But if I hadn't interceded, the parcel would have gone back. [88]

* * *

General Counsel's Exhibit No. 2—(Continued)

JOHN WESLEY GRISINGER

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: John Wesley Grisinger.

* * *

Direct Examination

By Mr. Weil:

Q. What is your address, Mr. Grisinger?

A. 4390 Atlantic Boulevard, Long Beach, California.

Q. Is that your business address?

A. That is my business address, yes.

Q. Do you have a restaurant located there at that address?

A. Yes. Another located at 1632 East Fourth Street.

Q. Are you engaged in the operation of these two restaurants?

A. Yes, in partners with my brother.

Q. Having reference to the restaurant on Atlantic Avenue——

The Clerk: Petitioner's Exhibit 5 marked. [93]

(The exhibit referred to was marked as Petitioner's Exhibit No. 5 for identification.)

The Clerk: Petitioner's Exhibit 6 marked.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

(The exhibit referred to was marked as Petitioner's Exhibit No. 6 for identification.)

Q. (By Mr. Weil): Showing you what has been marked as Petitioner's Exhibit 5 for identification, I will ask you if that is an approximation of the layout of your Atlantic Avenue restaurant.

A. It is.

Q. I am marking the corner of your lot on Atlantic Avenue as "A"; the corner on San Antonio Street "B," and the internal corner "C"; will you tell me what is the approximate distance from point "A" to point "C"?

A. Roughly I think 133 feet. I haven't measured that for some length of time. I don't quite remember that.

Q. That is the depth into the block from Atlantic Avenue that your lot goes?

A. I believe somewhere in that approximation.

Q. What is the depth into the block from San Antonio that your lot goes, the point, in other words, from "B" to "C"?

A. I believe about the same.

Q. I call your attention to the figure which is roughly drawn, which I shall mark "X," and ask you what that [94] is.

A. That is the restaurant itself.

Q. Is that restaurant approximately in the same scale as the rest of the map? A. Yes.

Q. Does that fit the rest of the map?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

A. Yes.

Q. A figure appears in the corner at "C," which I have marked "Y"; what does that figure indicate?

A. That indicates a store house and restaurant.

Q. In the space between the restaurant and the store house, is any use made of that space?

A. That is a parking lot area for customers. We have car service served by car hops, and customers who come on the inside, we have ample parking place for them.

Q. I have marked the corners of the restaurant "D" on the Atlantic Avenue side, "E" on the San Antonio Street side. I will ask you this: Is the space between "A" and "D" and the space between "E" and "B" open curbing over which cars pass in your parking lot?

A. There is a driveway in this area and over on this area, which is the Atlantic side, and one on the San Antonio side, approximately 20 feet entrance on each side.

Q. Is that the only entrance to the parking lot between "X" and "Y"? [95]

A. Yes.

Q. I will ask you to take the pen and mark the route followed by the pickets—was there picketing, first, at that place of business?

A. Yes, there was.

Q. During what period of time?

A. During the time the convention was held in

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

Long Beach, the labor convention. That was some time in August.

Q. I will ask you to mark with a pen the route followed by the pickets.

A. Well, he picketed mainly from this point over here to this point here, completely the entire area, from one property line to the other property line.

Q. Entirely around the curb from A to B, is that correct? A. Yes, sir.

Q. Is there any other way that people or trucks or cars can get into the lot than through the two entrances between—the entrance between A and D and the entrance between E and B? A. No.

Q. Is there any entrance between A and C?

A. No.

Q. Or between C and B? A. No. [96]

Q. Does your restaurant have a service entrance?

A. No, it does not.

Q. Where do the employees enter your restaurant?

A. Well, they can enter from—we don't have any specified place; they can either enter the front door or back door.

Q. Where is the back door located?

A. Here (indicating), which is around the service entrance where the car hops are. There is parking for car service along in this area here (indicating).

Q. I have put the figure "Z"; is that approxi-

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

mately where the rear entrance is? A. Yes.

Q. Are the customer entrances at the front approximately in the places where the D and E appear in this diagram? A. Yes.

Q. When delivery men deliver supplies and equipment to this restaurant, where do they deliver them, where in the restaurant, to what door?

A. Well, they generally come to this back door, and we have a basement, we put some of the things in the basement downstairs. The other things we put out in the back door, back here, "Y."

Does that answer your question?

Q. I believe so. [97]

Do your suppliers generally drive their trucks into the lot to make deliveries?

A. Yes. They have to.

Q. Is parking permitted by the city on any point on Atlantic Avenue or San Antonio Street contiguous to your property?

A. No, sir; it is all red line all the way around.

Q. Thank you.

Mr. Weil: I would like to offer Petitioner's 5.

The Court: It will be received.

(The exhibit referred to was received in evidence and marked as Petitioner's Exhibit No. 5.)

Q. (By Mr. Weil): Showing you Petitioner's 6 for identification, I will ask you whether this appears to be a diagram of your restaurant on East

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

Fourth Street. A. It does.

Q. The space which is marked with a figure 10, I will ask you is that approximately 10 feet across?

A. Yes.

Q. Is that space used for anything?

A. Yes; a driveway for customers to drive out. This happens to be in the middle of a block. There is an apartment house on this side and a store building on this side, and this 10 feet is where the customers can drive out. This is also a parking lot for customers. [98]

We have car service in this area also. This is the main entrance that they drive into our place of business and this is where they can circle and drive out.

Q. Is there any fencing or curbing or anything cutting off your lot from the alley?

A. No, sir.

Q. Will you take my pen and draw across that map the route followed by the pickets?

A. Is this assuming a street or sidewalk?

Q. Assuming this in front of the block as Fourth Street.

A. From the property line to this property line over here, this entire area.

Q. Did the picket there walk across an entrance on this side? A. Yes.

Q. That would be to the west? A. Yes.

Q. I have put in the compass mark, is that correct? A. Yes.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

Q. And they walk across the exit on the east side, is that correct? A. Yes.

Q. Is this exit marked in such a way that it is not used as an entrance? [99]

A. That's right, it is.

Q. What sort of markings?

A. Well, it is marked as Exit on the side of the building, as I recall.

Q. Can you tell me, is there a service entrance there that the employees use in that restaurant?

A. The employees can use either entrance; they can either come in the front door or the back door. Some come in one and some the other.

Q. Where is the front door?

A. The front door is in this cove right here, right at this point here.

Q. Would you put the letter "F" there to identify the place you have marked?

A. (Witness does as requested.)

Q. Where is the back door?

A. (Witness marking on exhibit.)

Q. Would you put the letter "B" for back door?

A. (Witness does as requested.)

Q. Are your employees permitted to park on your parking lot there? A. Yes, they are.

Q. Do they, do you know?

A. Yes, they do.

Q. Do you know whether they enter through the entry at [100] the front of the Fourth Street side of your property?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

A. They can. It is optional.

Q. There is no rule either way?

A. No rule either way.

Q. Do you know whether, in fact, they do?

A. I think some come in one way and some another.

Q. How about delivery men, where are deliveries made to this restaurant?

A. Back door, normally.

Q. Are any deliveries made from the front door?

A. The normal delivery would be through the back door. The only one—we would say a person who didn't know the place would come to the front door, a parcel post man or something of that kind.

Q. Do you know whether delivery men drive in through the entry on Fourth Street or come down the alley, or what?

A. They come down the entrance at Fourth Street.

Mr. Weil: I would like to offer Petitioner's 6 for identification.

The Court: It will be received.

(The exhibit referred to was received in evidence and marked as Petitioner's Exhibit No. 6.)

Q. (By Mr. Weil): Have you had any conversation or conference with any representatives of either the Teamsters local or the Laundry Workers local that are parties to this [101] proceeding,

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

to your knowledge? A. No, sir.

Q. Have you ever been called on by Mr. Leg-
gieri? A. No, sir.

Q. Are your employees represented by any
union?

A. The Culinary Union of Long Beach.

Q. Do you have a bar or liquor service in either
of the two restaurants you operate?

A. No, sir.

Q. Do you purchase linen service?

A. Yes, sir.

Q. From whom? A. Southern Service.

Q. For how long have you been purchasing linen
service from Southern Service?

A. Since my father started in 1923, we have been
taking from them ever since.

Q. Do you have knowledge whether the picketing
of either of your restaurants has resulted in the
stopping of any supplies that have been delivered
to your restaurant, or holding up supplies being
delivered to your restaurant? A. Yes.

Q. At which restaurant?

A. The Fourth Street restaurant and Atlantic
Avenue, both of them. [102]

Q. Referring specifically to the Fourth Street
restaurant, can you tell me on what occasions the
picketing affected your deliveries there?

A. Yes. Burr Bros. Meat Company refused to
make delivery.

Mr. Hackler: What is that name?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

The Witness: Burr Bros., B-u-r-r.

Q. (By Mr. Weil): When was that, sir?

A. That was probably the first day of the picketing. The first or second day.

Q. August 13th or 14th?

A. Yes, sir, those two days in there.

Q. Did anyone else refuse to make deliveries, or were any other deliveries stopped at that restaurant that you know of?

A. Douglas Bros. didn't make a delivery that day. That is a vegetable company. They called up and said that they refused to make delivery, they couldn't make it because there was a picket line.

Q. Do you know of any other occasions at that restaurant?

A. No, sir.

Q. Referring now to the Atlantic Avenue restaurant, were any deliveries held up or not made there because of the picketing, to your knowledge? [103]

A. Yes. Burr Bros. said that they could not make delivery, and refused to make delivery, and we needed the merchandise so my brother got into his car and went down and got the merchandise from them.

* * *

Cross-Examination

By Mr. Hackler: [104]

* * *

Q. You knew before the pickets appeared that

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

these unions had in mind picketing some of the restaurants that the delegates might visit, did you not?

A. Only through our local Culinary Union representative.

Q. You had spoken to him before the pickets appeared, had you not?

A. No; he had spoken to me regarding the matter.

Q. As a matter of fact, he tried to get you to switch to a unionized laundry service, didn't he?

A. What he said, in effect, was this: He said if we did not change—he asked me, first, what laundry we used. I told him Southern Service. He said, "I want to warn you if you don't change, that you will have a picket line on your place of business."

I said, "Is that a threat?"

And there was quite a long wait, and he waited and said, "Well, I just want to warn you."

I said, "I take that as a threat, then."

Q. Isn't it a fact that he went on and told you that that picket line would not be for the purpose of calling his members off the job at all?

A. He did not. [105]

* * *

Q. Who did you talk to before the pickets appeared that you knew pickets were going to appear?

A. I didn't know they were going to appear. I was warned they would appear if I didn't change laundries.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

Q. Who made that threat to you? [106]

A. Dave Shultz.

Q. And who is Mr. Shultz?

A. He is the field representative with the Culinary Union.

Q. Was that at one of your places of business?

A. Yes.

Q. And he coupled that with an appeal to request you to change to union laundry service?

A. He didn't make an appeal. He just threatened me.

Q. He said, "If you don't change, you are liable to have picket lines"? [107]

* * *

Q. It is your testimony that you were not aware of any effort to confer with you by Mr. Leggieri or any other representatives of these picketing unions? A. That is right.

Q. The first thing you knew, the pickets appeared? A. That's right.

Q. What time of morning did they appear?

A. They called me out of bed and said there were pickets in front of our place of business.

Q. What time of day was that?

A. Approximately 8:00 o'clock in the morning.

Q. How long did they remain in front of your two establishments? A. Five days.

Q. Were they there all day long for the five days?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

A. They were for the first day, they were there all day long.

Q. Both places? A. I believe so.

Q. Did you personally inspect them at both places? A. Yes.

Q. They were there all day long beginning at 8:00 o'clock in the morning, is that right?

A. I believe the first day they were. [111]

Q. Until how late in the afternoon?

A. Until around 6:00 or 7:00 o'clock.

Q. What time do your employees first go to work in the morning? A. Around 7:00.

Q. The rest of the week did they confine their picketing to meal times?

A. They came in at various times.

Q. Were those, roughly, meal times, sir?

A. Not necessarily. They came in at different times.

Q. Tell us when they picketed to your observation after the first day.

A. After the first day?

Q. Yes.

A. Some time between 12:00 and 2:00, and they would come back again at 5:00 to 6:00.

Q. Did they picket on Saturday at all of that week? A. No.

Q. Just Monday through Friday?

A. Monday through Friday. [112]

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

Q. What effect did it have on your employees?
Did any of them leave their job?

A. They called me in the morning and asked me whether they should work or not. I told them it was up to them. When I came in, they asked me whether they should continue to work. I told them it was up to them, it was their decision.

Q. Did any of them walk off the job?

A. No. They said they didn't have any beef with me and they were going to stay on the job. [117]

* * *

Q. You understood it was to cut down your customers, or get you to change your linen service?

A. No. It was a picket line.

* * *

Q. What is the fact with respect to their failure to deliver that you refer to? How did it come to your attention, first?

A. They called us up.

Q. Some official there?

A. Yes.

Q. What did he say?

A. He said they couldn't make a delivery because there was a picket line at our place.

Q. Which place was that?

A. Atlantic Avenue. [127]

Q. What time?

A. Around 11:00 or 12:00 o'clock.

Q. What did you say to him?

A. I said, "Okay, we will come and get it ourselves."

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

Q. Did you explain to him that you understood the picket line was directed toward your customers only?

A. At that time we didn't understand that at all.

Q. Was that the first day of the picketing?

A. Yes, sir.

Q. You went to the establishment and picked up the merchandise?

A. My brother did. [128]

* * *

Q. You mentioned the Burr Bros. were involved in an incident at your other location; was that a separate incident? A. Separate incident.

Q. How did that come about?

A. The driver refused to go through.

Q. Did you see him refuse? A. No, sir.

Q. You heard that from someone else?

A. From an employee. [129]

Q. Was that the first day of the picketing?

A. Yes, sir.

Q. What did you do then?

A. What did I do?

Q. Yes.

A. There wasn't anything that I could do. [130]

* * *

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Wesley Grisinger.)

Redirect Examination

By Mr. Weil:

Q. What hours is your restaurant open on Atlantic Avenue?

A. 7:00 in the morning for business.

Q. Until how late in the evening?

A. 1:00 o'clock during the week and 2:00 o'clock on week-ends.

Q. The same hours at Fourth Street?

A. Yes. That is 2:00 o'clock a. m.

Q. From 7:00 until 2:00 in the morning?

A. Yes, sir.

Q. Do the same employees work through that entire period of time? A. Hardly.

Q. When—— A. We have two shifts.

Q. When does the second shift come in?

A. Normally around 4:30. [132]

* * *

EDWARD J. GRAHAM

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: Edward J. Graham.

The Clerk: G-r-a-h-a-m?

The Witness: Yes.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Edward J. Graham.)

Direct Examination

By Mr. Weil:

Q. Where do you live, Mr. Graham?

A. 319 Elm in Long Beach.

Q. Where do you work?

A. I work for Grisinger's Drive-In on Fourth Street.

Q. What do you do there?

A. I am a cook.

Q. Calling your attention to a period in August of this year, 1956, when there was picketing going on, do you recall an incident when Burr Bros.' truck came to deliver some meat during that picketing? A. When they came to deliver?

Q. Yes, do you recall?

A. There was a couple of times that they came to deliver, but they didn't bring it in, we had to go out and get [133] it and bring it in off the truck.

Q. Do you know who the delivery man was?

A. Yes.

Q. What is his name?

A. I only know his first name. Allan.

Q. Al? A. Al, yes.

Q. Where did he park his car?

A. On the alley. And the dishwasher and I went out to get the meat.

Mr. Hackler: I can't hear. I am sorry.

The Court: Keep your voice up.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Edward J. Graham.)

(Answer read by the reporter.)

Q. (By Mr. Weil): How did you know he was out there with the meat?

A. He honked his horn, and she looked out and told me that he was out there with the delivery.

Q. Did you have any conversation with him at the time you brought the meat in?

A. Yes. We always talk.

Q. Did you ask him to bring the meat in?

A. No. He said he didn't want to get a fine, that they might fine him if he brought it in.

Q. On how many occasions did you carry the meat in like that? [134]

A. I think it was two or three. I forget.

Q. Did you speak to any of the pickets yourself?

A. Yes, sir, I spoke to one of the guys there that was walking the picket line. He had a shirt on like I had, and I just talked to him and asked him where he got it, you know, and he told me. And then I asked him what he was doing there on the picket line, what were they striking for. And he said he didn't know.

And I said, "What do you mean, you don't know"?

And he told me that he didn't belong to the Laundry Union, that he belonged to the Janitors Union.

I said, "What has that got to do with you"?

And he said, "Nothing."

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Edward J. Graham.)

Q. Can you estimate how far it is from the restaurant in which you work to the convention hall?

A. I don't know. I imagine it would be about a mile.

Q. Have you ever walked that distance?

A. Yes.

Q. Did you ever walk from the restaurant to the convention hall? A. Yes.

Q. How long does it take you to walk there?

A. I don't know. I guess I can walk there in 10 or 15 minutes.

Q. Do you know where Atlantic Avenue is? [135]

A. Yes.

Q. Do you know about how far that is from the convention hall?

A. About five or six miles.

Q. Are you a member of any union?

A. Yes.

Q. What union?

A. The local in Long Beach.

Q. What union? A. Culinary Union.

Q. Prior to the picketing, were you informed by your union that there was going to be any picketing?

A. No, I didn't know anything about it. I just came to work one morning and there they were. I got there about 7:00. They came about 7:00, and there they were, and I was wondering what it was

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Edward J. Graham.)

all about, so I talked to him what it was about, and——

The Court: Keep your voice up.

Q. (By Mr. Weil): Is that the conversation you spoke of before? A. Yes.

Q. Was there anything else to that conversation that you can recall?

A. No. I talked to the fellow about the shirt deal, and he said that he didn't belong to that union but he was out [136] of work, and he said that the Laundry Union called up the Janitors Union and asked if they had anybody that wasn't working, to send them over and they would pay them for walking that picket line for them, and he was getting so much an hour, I think he told me it was a buck and a quarter an hour for walking the picket line, and he needed the money because he was out of work and he had a wife and kid to support, so he took the job.

Mr. Weil: I have no other questions of this witness.

Cross-Examination

By Mr. Hackler:

Q. Mr. Graham, you worked at that time at the Fourth Street restaurant? A. Yes, I did.

Q. How long had you been a member of the Culinary Union? A. About a year.

Q. What? A. About a year.

Q. Will you hold your voice up, please.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Edward J. Graham.)

A. A couple of years.

Q. When you saw the picket there the first morning that it came to your attention, did you cease work? A. No. [137]

Q. Did you, or as far as you know, any of your fellow employees make any effort to get a hold of the owner of the business, or the manager, to find out——

A. They already knew about it. There was no sense calling them, because they knew about it, because the Atlantic Avenue store opens before we do. [138]

* * *

ALLEN R. RUSSELL

called as a witness by the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Give us your full name.

The Witness: Allen R. Russell.

The Clerk: A-l-l-e-n?

The Witness: Yes.

The Clerk: R-u-s-s-e-l-l?

The Witness: Yes.

Direct Examination

By Mr. Weil:

Q. What is your address, Mr. Russell?

A. 309 West 31st.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Allen A. Russell.)

Q. By whom are you employed?

A. Burr Bros. Meat Company.

Q. What do you do for Burr Bros.?

A. Drive a truck.

Q. What do you do with your truck?

A. Pardon?

Q. What do you do with your truck, where do you drive [142] it?

A. Deliver to restaurants.

Q. Do you deliver to Grisinger's restaurant on Fourth Street in the normal course of your route?

A. Yes.

Q. Do you recall an incident during August of this year, 1956, when you delivered to Grisinger's on Fourth Street and saw a picket sign?

A. Well, the first time the picket line was up, I delivered from the alley; I delivered down on Belmont Shores, I come down Broadway and came in the alley and made the delivery, and then went out the front way, and the picket line was out in front then.

Mr. Hackler: May I have the last answer read?

(Answer read by the reporter.)

Q. (By Mr. Weil): Did you speak to the picket? A. No, I didn't.

Q. Was there more than one picket there?

A. I think there was two or three. I am not sure.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Allen A. Russell.)

Q. Did you thereafter make any deliveries while there were pickets at that restaurant?

A. From the alley, yes.

Q. What did you do, specifically?

A. Well, nobody really said anything to me about it, and I had only been driving for a little while, so I just made [143] the delivery from the alley. I would honk the horn and they came out to get the meat. I didn't know if I would get a fine or not for going through a picket line.

Q. Did you ask anyone whether or not to cross that picket line?

A. Well, I asked my boss about it, more or less, and he said he would let me know. He said he would phone up and find out for me about it.

Q. Did you cross that picket line at any time while it was up? A. After that once?

Q. Yes. A. I only went through it once.

Q. Do you normally make deliveries to Grisinger's other restaurant on Atlantic Avenue?

A. No, I don't.

Q. Were you told, given any information by any official of your union concerning that picket line?

A. No, I wasn't.

Mr. Weil: I have nothing further of this witness.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Allen A. Russell.)

Cross-Examination

By Mr. Hackler:

Q. Mr. Russell, I think you said that you first delivered down the alley and then crossed the picket line leaving [144] out through the front entrance, is that correct? A. Yes.

Q. And that subsequently you continued to deliver down the alley? A. Yes.

Q. And on those occasions you turned around and went back out the alley, I presume?

A. Right.

Q. I understood you to say that you told your employer about this picket line, is that correct?

A. That's right.

Q. And that he said that he would check with the union and find out what it was all about?

A. That is the way I recall it. It has been so long ago I really don't remember, but that is the way I recall it.

Q. Did your employer report anything back to you?

A. I don't remember. It was just something that I forgot about it.

Q. You just continued delivering down the alley and avoiding the picket line?

A. Yes. If the picket line wasn't there, I would go ahead and make the delivery.

Q. Do I understand, though, that during the

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Allen A. Russell.)

time that the pickets were there, you continued to deliver down the alley? [145] A. Right.

Q. And except for the first time, you avoided crossing the picket line by going back out the alley?

A. The first time before I knew anything about it, I went through it going out, but not coming in, because I entered from the alley and I didn't even know they were out there.

Q. Is that the usual way to enter from the alley?

A. That is the way I have been delivering. When I have the Belmont Shore district to deliver.

Q. What union are you a member of?

A. Teamsters Union.

Q. What local of the Teamsters Union?

A. I don't remember the number. I have only been with them a couple of months.

Q. You have just been on the job a couple of months?

A. I have been on the job for quite a while, but only been driving a few months.

Q. Is that the Teamsters local in Long Beach?

A. Yes.

Q. You don't happen to know any of your officials' names, do you? A. No, I don't.

Q. During the time that these pickets were there, did any person claiming to represent your local tell you that you [146] ought not to cross this picket line? A. No. [147]

General Counsel's Exhibit No. 2—(Continued)

HARLEY R. SCHAEFER

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: Harley R. Schaefer.

The Clerk: Spell your first name.

The Witness: H-a-r-l-e-y.

The Clerk: And your last name?

The Witness: Schaefer, S-c-h-a-e-f-e-r.

Direct Examination

By Mr. Weil:

Q. What is your address, Mr. Schaefer?

A. Pardon?

Q. What is your address?

A. 10262 Hackamore Road, Garden Grove.

Q. By whom are you employed? [152]

A. Carnation Company.

Q. What do you do for the Carnation Company?

A. I drive an ice cream truck on an ice cream run.

Q. Keep your voice up, please. It is difficult to hear you.

Is Madsen's Restaurant on American Avenue in Long Beach on your ice cream route?

A. Yes, sir.

Q. Do you make deliveries at Madsen's?

A. Yes, sir.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Harley R. Schaefer.)

Q. Do you recall an occasion during August, 1956, when you encountered pickets at Madsen's?

A. I do.

Q. Will you tell us what happened?

A. I got there about 9:00 o'clock in the morning, and as usual I opened the two iron doors, went down below and checked the cabinets to see how much merchandise I should leave. I turned around and went out, and as I came up the chute, up the ladder by the chute, I saw these two pickets come around the corner off the Ocean Boulevard side of the restaurant. I went to my truck and started to take in some ice cream, and a bread man came along and asked me if I was going to deliver, and I said I figure I will. And he said, "Well, you must have more hundred dollars than I do." So I, in turn, turned around and threw the ice cream back on the [153] truck and went down to my next stop and called the plant.

Q. Had you been informed prior to this by your union, or by any union representatives, that there was going to be an advertising line there?

A. No, sir.

Q. Had you been informed there was going to be any kind of picketing? A. No, sir.

Q. Were you ever instructed by your union, or any union, that you should cross the picket line there?

A. As far as I know, I am not supposed to cross a picket line.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Harley R. Schaefer.)

Q. Did you make any other deliveries at Madsen's, or attempted deliveries at Madsen's while they were picketing?

A. Yes, sir, I made delivery there the next day, the Thursday following that first day, and also on Saturday.

Q. Did you have any conversation with the picket?

A. The first day I believe it was I asked him if it was okay to deliver, and he said he didn't know, that he had been hired to walk the picket line; and also I asked him if their captain was around, and he said he was over eating lunch. So I decided that I would not deliver.

Mr. Weil: I have nothing further from this witness. [154]

Cross-Examination

By Mr. Hackler:

Q. Mr. Schaefer, I believe it is your testimony that upon your return from this first visit to Madsen's, that you spoke to your company?

A. Yes, sir.

Q. And then I believe you said that the rest of the week you went ahead and delivered?

A. Yes, sir.

Q. Did you learn through your company that the picket line had no application to you?

A. That's right. I learned about 3:30 of the after-

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Harley R. Schaefer.)

noon of the first day that I could either serve or didn't have to.

Q. When did you then make a delivery?

A. On the following Thursday.

Q. So that I am clear, the reason that you failed to make your delivery the first time you were there was you had the conversation with a bread truck driver, is that correct? A. That's right.

Q. And he expressed the opinion that there might be a fine involved? A. That's right.

Q. Did any picket there tell you not to deliver?

A. No, sir. [155]

Q. The picket told you simply that he was a hired picket, is that correct?

A. That is right.

Q. And that his captain was over eating lunch or breakfast, is that right? A. Yes.

Q. What local are you a member of?

A. Local 572, Long Beach.

Q. Where does it have headquarters?

A. Long Beach.

Q. That is the Long Beach Teamsters local?

A. Teamsters and Cab Drivers Union. [156]

* * *

Q. I will withdraw the question and rephrase it.

In the course of your duties, have you ever had occasion to come up to a picket line and go to a telephone and call them and find out if it had any application to you?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Harley R. Schaefer.)

A. Only on that one occasion.

Q. On that occasion did you call your own union?

A. Yes.

Q. Who did you speak to there?

A. I didn't get ahold of either of the fellows in charge of the union, so later on in the day as I was going around my route I went up to the union hall and I asked Mr. Culpepper, I believe his name was.

Q. He told you it was perfectly all right to go ahead and serve that restaurant? A. No, sir.

Q. What did he tell you?

A. He told me not to go across the line.

Q. What was his name?

A. Mr. Culpepper.

Q. What union is he with?

A. Local 572. [157]

Q. Can you give us the substance of your conversation with Mr. Culpepper?

A. Well, I asked him if he knew anything about this picket line down around Madsen's Restaurant, and he said he knew there was one there, but he said he didn't know what it was there for.

I asked him if it was all right if I was to make a delivery, and he said, "No, sir, you are not supposed to go across the line."

Q. Was that the whole conversation with him?

A. That was. [158]

General Counsel's Exhibit No. 2—(Continued)

MICHAEL R. CALLAHAN

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: Michael R. Callahan.

The Clerk: Would you spell your last name?

The Witness: C-a-l-l-a-h-a-n.

Direct Examination

By Mr. Weil:

Q. What do you do for a living, Mr. Callahan?

A. I am the executive secretary of the Bartenders Union, Long Beach.

Q. What union is that, what local?

A. Local 686.

Q. What is the jurisdiction of Local 686?

A. It includes Long Beach, Lynwood, Compton, and all of Orange County.

Q. Do you represent the bartenders at Jack's Corsican Room? A. Yes; I do. [159]

Q. Do you represent the bartenders at any other of the restaurants that were picketed?

A. I think there was two other places, the Gyro Room on Ocean Avenue, and the Star Dust on First Street.

Q. Do you represent their employees?

A. Yes.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Michael R. Callahan.)

Q. Prior to the picketing which began on August 13th, were you informed there was going to be picketing at that time? A. Yes; I was.

Q. By whom?

A. I knew about the action that was to take place from the central Labor Council meeting that we had in Long Beach when the State Federation of Labor withdrew their forthcoming convention for the City of Long Beach due to the fact that the invitation had been protested by the Teamsters Union, the Laundry Workers Union, and Operating Engineers.

Q. Is that how you learned that there was going to be picketing on August 13th at these restaurants?

A. No. At a subsequent meeting where officials of the executive board of the Long Beach Owners Association, the Culinary Union, the Bartenders Union of Long Beach, and the Teamsters Union and the Laundry Workers Union had a meeting at the Lafayette Hotel, and also members of the Long Beach Convention Bureau were at that meeting. [160]

Q. When was this meeting?

A. This was about six months prior to the convention.

Q. Did you learn at that meeting that there was going to be picketing on August 13th at these restaurants?

A. Well, at that meeting it was pointed out——

Q. Just answer yes or no. A. Yes.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Michael R. Callahan.)

Q. You did learn that there would be picketing at these restaurants on August 13th?

A. Not specifically those restaurants, but at some restaurants.

Q. Did you learn that there would be picketing specifically at any restaurant, on August 13, 1956?

A. Restaurants that were using nonunion laundry.

Q. On the morning of August 13, 1956, did you know what restaurants were going to be picketed prior to the start of the picketing? A. No.

Q. Did you inform any employees of any restaurants, prior to the morning of the 13th, that their restaurant would be picketed on the morning of the 13th of August? A. No. [161]

* * *

RICHARD J. SELTZER

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and state your full name.

The Witness: Richard J. Seltzer, S-e-l-t-z-e-r.

* * *

Cross-Examination

By Mr. Weil:

Q. Mr. Seltzer, you stated that you instructed various persons to take no action concerning what

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Richard J. Seltzer.)

you term an advertising picket line. Precisely whom did you instruct, did you give those instructions to?

A. My other business representatives.

Q. Anyone else?

A. No. The girls in the office.

Mr. Weil: I have no further questions.

* * *

ELMER JOSEPH PERKINS

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please, and give us your full name.

The Witness: Elmer Joseph Perkins.

The Clerk: Elmer Joseph Perkins?

The Witness: Yes. P-e-r-k-i-n-s. [200]

Direct Examination

By Mr. Hackler:

Q. Where do you live, Mr. Perkins?

A. In Long Beach.

Q. What is your occupation?

A. I am the business representative of Local 692.

Q. Of what union?

A. General Truck Drivers Union, Local 692.

Q. That is a different local union from Mr. Seltzer's local, is that correct?

A. That is correct.

General Counsel's Exhibit No. 2—(Continued)
(Testimony of Elmer Joseph Perkins.)

Q. And both of them function in the Long Beach area, however? A. That is correct.

Q. The jurisdiction of your local extends to what type of workers?

A. General heavy truck driving and grocery hauling, and other types, warehousing work. [201]

* * *

Q. Did it come to your attention prior to that convention at all that there might be some picketing of restaurants in the Long Beach area?

A. I had heard rumors to that effect.

Q. Did you have any definite information concerning whether there would or would not be picketing at restaurants?

A. No; I didn't have at the time.

Q. During the time of the convention it came to your [202] attention that picketing was taking place at some restaurants, did it not?

A. That is correct.

Q. How did that come to your attention?

A. Two employers that we have contractual relations with called in, including a couple of members.

Q. What firms were those employers?

A. Cuttings Wholesale Grocery, and Davis La-grande. [203]

* * *

General Counsel's Exhibit No. 2—(Continued)

JOHN LEGGIERI

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: John Leggieri, L-e-g-g-i-e-r-i.

Direct Examination

By Mr. Hackler: [205]

* * *

Q. In the course of visiting these some thirty restaurants, did you get some of them to change over to a unionized linen service?

A. Yes, sir; quite a few.

Q. Did that continue right up to Friday before the [221] Monday before the convention?

A. Yes, sir; right through.

Q. Did you have any assistance in getting these restaurants to switch their business to a union laundry?

A. Yes; help from the other unions that possibly knew, maybe, the owner a little better than I did, and that type of assistance.

Q. Were you the person that actually established the picket lines on the day the convention opened?

A. Yes; I was in charge.

Q. When did you know the places that you were

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Leggieri.)

going to place the picket lines, how late was it before the convention, how long before?

A. Actually, right up until office closing time Friday night, because there were a few that were in that area that to my knowledge had not changed, and I waited for telephone conversations or telephone calls from some of these operators that I had been working with, that I had been discussing it with and talking to them, and they didn't say definitely that they wouldn't change, but they wanted to think about it; and actually up until Friday night I wasn't sure who was going to get the lines. [222]

* * *

Q. Did you give any instructions to these pickets that you set up?

A. Yes; they all received the same instructions.

Q. What were they?

A. First of all, the pickets got my personal card with a Hemlock number that we had a phone installed in the headquarters where I was at, and we told them that we didn't want the pickets to talk to anyone, and that if anyone came out from the establishment or from the street, or a driver, or anyone else, to talk to them, to be polite but to just hand them my card and ask them if they would call that number. [223]

Q. Where is your office that you usually work out of?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Leggieri.)

A. 846 South Union Avenue, Los Angeles.

Q. In Los Angeles? A. Yes.

Q. Do I understand that in connection with this convention picketing you people installed a telephone in the Long Beach area?

A. Yes. We headquartered in the meeting hall of Local 692, which is at 1314 Elm. We had a telephone installed there for the one-week period.

Q. With a Hemlock number?

A. With a Hemlock number.

Q. Was it on your card that you gave to the pickets? A. I wrote it on my card.

Q. Was someone in attendance at that telephone during all of that picketing?

A. Yes, sir; someone was in attendance from 7:00 in the morning until 11:00 at night, and a couple of nights until midnight.

Q. Did you stay down in Long Beach during that week? A. Yes; I stayed there.

Q. Did the person or persons manning the telephones have any instructions as to how they should answer inquiries? A. Yes, they did.

Q. What were those instructions? [224]

A. We expected—the telephone, the reason for its installation is we expected some of these restaurants that had the lines put on them to call us to find out what it was all about, and what other information they wanted to know. And those were the type of calls that we received, actually, and

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Leggieri.)

they would tell us that they would like the lines withdrawn and they would change to a union house, and then I dispatched a runner out there to take the lines off; and anyone who was on the phone, that was his instructions, and mainly—I mean, if it was possible that I was not out checking lines, to turn it over to me because I was in charge, but that is what the instructions were.

Q. Did you spend a part of your time checking lines? A. Yes.

Q. The person on the phone, this special phone that you had installed, did any inquiries come in from drivers or employees or employers asking whether or not this picket line was designed to call people off the job? A. Did any calls come in?

Q. Did any calls come in of that character as to whether or not the picket line meant that one was supposed to cease work?

A. No. We did have some calls from individuals who would not identify themselves and were trying to lead us to believe that they were union people, but we couldn't put any [225] stock in it, because they wouldn't say who they were, and we told them all the same story, that these were strictly advertising lines. [226]

* * *

Q. What was the reason for telling the pickets not to speak to people who came up to them, but to hand them this card you have described?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Leggieri.)

A. We have had experiences with picketing, and it was our intention to conduct this picketing this week on a peaceful basis, we didn't want any difficulties, and we felt that the best way to do it would be not to have the picket, man or woman, say anything to anyone, but just to be polite, because we found sometimes, if you will notice some of these places with bars, we would run into difficulty with people who came out with drinks, and one word would lead to another, and we didn't want that to happen. In fact, we took great precautions not to let that happen. [229]

* * *

Q. Did any of them switch during the picketing?

A. During the week of the convention?

Q. Yes. [234] A. Yes.

Q. Were the pickets taken down?

A. Immediately. [235]

* * *

Cross-Examination

By Mr. Weil:

* * *

Q. With reference to your testimony concerning the picket sign which appeared at the Galley Restaurant, that picture shows only one side of the picket sign; is it the same on both sides?

General Counsel's Exhibit No. 2—(Continued)
(Testimony of John Leggieri.)

A. Yes; they were placed back to back. Both sides were the same.

Q. Can you tell me, does the name of both picketing unions appear on both sides?

A. Yes; Local 52 at one end, at the bottom, and Local 28 at the other end.

Q. You used the same picket sign in all?

A. The same, we use, yes.

Mr. Weil: That is all.

Redirect Examination

By Mr. Hackler:

Q. Is the Southern Services about the only remaining nonunion linen service in this area?

A. Yes.

* * *

Received December 11, 1956. [238]

United States Court of Appeals
for the Ninth Circuit

No. 15947

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LAUNDRY, LINEN SUPPLY & DRY CLEAN-
ING DRIVERS LOCAL No. 928, aff/w IN-
TERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, AFL-CIO; LOCAL No. 52, LAUNDRY
& DRY CLEANING WORKERS INTERNA-
TIONAL, AFL-CIO,

Respondents.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to
the National Labor Relations Act, as amended (61
Stat. 136, 29 U.S.C., Secs. 151, et seq.), hereinafter
called the Act, respectfully petitions this Court for
the enforcement of its order against Respondents,
Laundry, Linen Supply & Dry Cleaning Drivers
Local No. 928, affiliated with International Brother-
hood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, AFL-CIO ; Local No. 52, Laundry & Dry Cleaning Workers International, AFL-CIO, their officers, representatives, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "Laundry, Linen Supply & Dry Cleaning Drivers Local No. 928, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO ; and Local No. 52, Laundry & Dry Cleaning Workers International, AFL-CIO, and Southern Service Company, Ltd.," Case No. 21-CC-238.

In support of this petition the Board respectfully shows :

(1) Respondents are labor organizations engaged in promoting and protecting the interests of its members in the State of California within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on September 25, 1957, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondents, their officers, representatives, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondents counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, and pursuant to Rule 34 (7) (a) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon a decree enforcing those sections of the Board's said order, which relate specifically to the Respondents herein, and requiring Respondents, their officers, representatives, agents, successors, and assigns to comply therewith.

NATIONAL LABOR
RELATIONS BOARD,

/s/ THOMAS J. McDERMOTT,
Associate General Counsel.

Dated at Washington, D. C., this 18th day of March, 1958.

[Endorsed]: Filed March 24, 1958.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
PETITIONER INTENDS TO RELY

In this proceeding the National Labor Relations Board will urge and rely on the following points:

1. The Board properly found that respondents, with the object of compelling neutral employers to cease doing business with another person, induced or encouraged employees to engage in a concerted refusal to perform services, thereby violating Section 8 (b) (4) (A).

2. The Board's order is valid and proper.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ THOMAS J. McDERMOTT,
Associate General Counsel.

Dated at Washington, D. C., this 18th day of March, 1958.

[Endorsed]: Filed March 24, 1958.

[Title of Court of Appeals and Cause.]

CERTIFIED LIST OF THE NATIONAL
LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Rela-

tions Board, Series 6, as amended, hereby certifies that the list set forth below constitutes a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "Laundry, Linen Supply & Dry Cleaning Drivers Local No. 928, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO; and Local No. 52, Laundry & Dry Cleaning Workers International, AFL-CIO, and Southern Service Company, Ltd.," Case No. 21-CC-238 before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

General Counsel's Exhibits:

1-A through 1-G, inclusive.

Stenographic transcript of testimony taken before Trial Examiner Wallace E. Royster on December 17, 1956.

Copy of Trial Examiner Royster's Intermediate Report and Recommended Order, dated January 23, 1957.

General Counsel's exceptions to the Intermediate Report received February 15, 1957.

Copy of Decision and Order issued by the National Labor Relations Board on September 25, 1957.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being there-

unto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 18th day of March, 1958.

[Seal] NATIONAL LABOR
RELATIONS BOARD,

/s/ FRANK M. KLEILER,
Executive Secretary.

[Endorsed]: Filed March 24, 1958.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCE-
MENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Comes Now respondents, Laundry, Linen Supply & Dry Cleaning Drivers Local No. 928 and Laundry and Dry Cleaning Workers Local No. 52, and in answer to the Petition in the above-entitled action allege as follows:

I.

Respondents admit the allegations contained in paragraph I.

II.

Respondents admit the allegations contained in paragraph II.

III.

Respondents deny that at any time pertinent herein they engaged in any acts or conduct in violation of the National Labor Relations Act, as amended.

Wherefore, respondents pray this Honorable Court deny the Petition for Enforcement of the Board order in the above-entitled case.

STEVENSON & HACKLER,

By /s/ CHARLES K. HACKLER.

Dated at Los Angeles, California, this 29th day of April, 1958.

[Endorsed]: Filed April 30, 1958.

[Endorsed]: No. 15947. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Laundry, Linen Supply & Dry Cleaning Drivers, Local 928, etc., et al., Respondents. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed April 30, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**LAUNDRY, LINEN SUPPLY & DRY CLEANING DRIVERS
LOCAL No. 928, Affiliated With INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA, AND
LOCAL No. 52, LAUNDRY & DRY CLEANING WORK-
ERS INTERNATIONAL, AFL-CIO, RESPONDENTS**

**On Petition for Enforcement of An Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JEROME D. FENTON,
General Counsel,

THOMAS J. McDERMOTT,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

**FREDERICK U. REEL,
JAMES A. FLYNN,**

*Attorneys,
National Labor Relations Board.*

FILED

JUL 15 1958

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15,947

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LAUNDRY, LINEN SUPPLY & DRY CLEANING DRIVERS
LOCAL No. 928, Affiliated With INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA, AND
LOCAL No. 52, LAUNDRY & DRY CLEANING WORK-
ERS INTERNATIONAL, AFL-CIO, RESPONDENTS

**On Petition for Enforcement of An Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order issued against respondents on September 25, 1957. The Board's decision

and order (R. 19-28)¹ are reported at 118 NLRB 1435. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in Long Beach, California.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that respondents, by picketing customers of Southern Service Company, Ltd. (herein called Southern), with an object of forcing the customers to cease doing business with Southern, induced and encouraged the employees of these customers, and employees of suppliers thereof, to engage in a strike or concerted refusal to work, in violation of Section 8 (b) (4) (A) of the Act. The facts upon which these findings are based, virtually undisputed, are summarized below:

Southern,² a California Corporation with main offices in Pomona, California, operates approximately thirty laundries throughout California, including several in Long Beach called Long Beach Linen Supply (R. 12; 33).

¹ References designated "R." are to the printed record. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence. Relevant portions of the Act appear in the Appendix, *infra*, p. 21.

² In 1955 Southern purchased and caused to be shipped to it from out of state linens, laundry, and dry cleaning supplies and equipment valued between \$500,000 and \$600,000 (R. 12-13; 32-33). The Board's jurisdiction is clear. *Capital Service, Inc. v. N.L.R.B.*, 204 F. 2d 848, 851 (C.A. 9), affirmed 347 U.S. 501; *N.L.R.B. v. Local 1976*, 241 F.2d 147, 151-153 (C.A. 9), affirmed June 16, 1958.

For a number of years the respondents have tried unsuccessfully to organize the employees of Southern, and at the time of the picketing described below, Southern was the only major non-union laundry remaining in Southern California (R. 13, 20; 35-37, 39-42, 46-48, 100). Although the plants of Long Beach Linen Supply had not been picketed in recent years, the Company was still the main target of the respondents' organizational efforts (R. 20; 48). Both respondents at the time material here were members of a group styled the "Southern Service Organizing Committee" whose sole purpose is apparent from its name (R. 39-42).

Respondents, having failed in their previous attempts to organize Southern's employees by appealing directly to the employees themselves, sought to accomplish their goal by other means. Many of Southern's customers were retail establishments such as restaurants, barber shops, beauty salons, and hotels. A union representative approached these establishments and asked them to cease doing business with Southern and to change to a union linen service. The Unions warned Southern's customers that if they continued to use Southern linens a picket line would be placed in front of their places of business. (R. 14, 20; 46, 52-53, 70-71, 95.)

Between August 13 and 18, 1956, while the State AFL-CIO convention was being held in Long Beach, the Unions sent pickets to patrol outside various Long Beach restaurants. The sign carried by these pickets read (R. 14, 20; 30):

NOTICE TO THE PUBLIC

THIS ESTABLISHMENT'S LINENS ARE
BEING PROCESSED BY A NON-UNION
LAUNDRY³

The picketing stopped after August 18, but was resumed at a single restaurant, Madsen's, on October 8, 1956, and was continuing there at the time of the hearing (R. 16; 50, 53-54, 71).

Although the picketing was largely confined to meal hours, the Unions on the first day of the picketing stationed pickets at Grisinger's Drive-in restaurants for the entire day (R. 71-72). Deliveries to the restaurants are made during meal times, as well as at other times, so that some deliveries were made or were scheduled while the picketing was taking place (R. 3; 54-56, 68-69). At some of the restaurants the Unions picketed only entrances used solely by patrons of the restaurant and did not picket entrances used by employees and deliverymen (R. 14-15). At Madsen's and two Grisinger Drive-ins, however, the picketing was conducted in front of entrances which were used by deliverymen and restaurant employees, as well as by customers (R. 14; 49-50, 55, 63-64). The pickets were not instructed to tell restaurant employees and deliverymen that they were free to

³ The words "Non-Union Laundry" dominated the sign, and were the only words easily read by the casual observer. See Exhibit K, which the printer inadvertently omitted from the printed record. On December 5, 1956, after this litigation commenced, the first line of the picket sign was changed to read "Notice to Patrons," but apparently no change was made in the size of the lettering (R. 20, n. 1; 7, 30).

cross the picket lines, but on the contrary were instructed not to answer any inquiries and to hand the questioner a card containing the Unions' telephone number (R. 96-98). The picketing at Madsen's and Grisinger's, which the Board found unlawful, is described in further detail in the following pages.

1. *The picketing at Madsen's restaurant*

Madsen's restaurant, located on the corner of American Avenue and Ocean Boulevard in Long Beach, California, employs about 20 people. The restaurant's entrance is located at the corner of the building facing the street intersection, and is used by employees and deliverymen, as well as customers. Another door, facing American Avenue, is used only for trash removal. Also on American Avenue, a short distance north of the main entrance, is a sidewalk delivery chute. This chute is used for large deliveries and is covered by steel doors when not in use. (R. 49-50.)

Late in July 1956, John Leggieri, business representative for the respondent Laundry Drivers' Union, asked Louis Madsen, owner of the restaurant, to stop using Southern linens and to change to a union laundry or subject his restaurant to being picketed. Madsen, who had been using Southern linen for approximately four years, refused and advised Leggieri that he would "stand the consequences." (R. 14, 20; 52-53.)

As noted above, the Unions picketed Madsen's during the week of the convention, and resumed picketing in October. The pickets patrolled from one end of

the restaurant around the corner to the other end, passing over the delivery chute and in front of the sole entrance (R. 14; 50-51, 53-54, 56). Because of the restaurant's large plate glass windows, the pickets were almost continually visible to restaurant employees working inside (R. 51, 55).

On the first day of picketing, Harley Schaefer, a driver for Carnation Company, was preparing to make a delivery at Madsen's when he saw the pickets coming around the corner of the restaurant. As he unloaded supplies from his truck, a deliveryman employed by a bakery approached and asked if Schaefer was going to deliver the supplies. When Schaefer stated he would, the deliveryman replied, "Well, you must have more hundred dollars than I do." Schaefer then approached one of the pickets and asked if it was all right to make the delivery. The picket answered that "he didn't know" and that "he had been hired to walk the picket line." Schaefer left without making the delivery. Later that day, Carnation delivered the goods in a private automobile. (R. 15; 85-87, 57-59.)

Schaefer was a member of a Teamster local and stated at the hearing that he had not received prior notice that a picket line would be placed at Madsen's. He stated further, "As far as I know, I am not supposed to cross a picket line" (R. 25; 86). After the incident above, Schaefer inquired at his union office if it was all right to make the deliveries. He was told by someone there, "not to go across the line." Later, his employer advised him that it was all right to deliver, "if I figured that I should." On the strength

of this, he made subsequent deliveries to the restaurant. (R. 15; 86-87).

Also on the first day of the picketing, the R. C. Griffith Company, a supplier, called the restaurant and informed Madsen that because of the pickets Griffith could not make deliveries, as its drivers would be subject to a hundred dollar fine (R. 23; 58). Douglas Brothers, another supplier, also called Madsen and said that their drivers were union and did not want to cross the picket line (R. 23; 54-55). After these suppliers checked with their employees' unions, deliveries were resumed (R. 58-59).

2. Picketing at the Grisinger's Drive-in restaurants

Grisinger's Drive-in on East 4th Street is located in the middle of the block. On one side is a parking area which extends around the rear of the building. A driveway provides access from the street. On the other side is an alleyway, approximately ten feet wide, used as an exit from the rear parking area. Restaurant employees and customers use the parking area, and deliverymen drive into the parking area to make their deliveries through a rear door. Pickets patrolled across the front of the restaurant and across the front of both driveways. (R. 64-67.)

Allen Russell, a truck driver for Burr Brothers Meat Company, first noticed the pickets as he was leaving through the exit driveway after completing a delivery at Grisinger's on August 13. On subsequent deliveries, to avoid the picket line, he used a back alley adjacent to the restaurant parking lot. From there he signalled the cook who would come to

the truck to get the meat. Russell also testified that he had not received any prior warning of the picket line, and used the above method of delivery to avoid any possible fine for crossing it. (R. 16; 76-77, 81-84.)

Grisinger's Atlantic Avenue restaurant is located at the intersection of Atlantic Avenue and San Antonio Street. One side of the restaurant faces the street; the other faces a large parking area used for drive-in customers. Restaurant employees and deliverymen also use the parking area in order to get to the service door located on the parking area side of the restaurant. Wide driveways provide access to the streets. Pickets patrolled from one edge of the property to the other, thus crossing both driveways as well as the front of the restaurant itself. (R. 61-64.)

Several suppliers phoned John Grisinger, the owner of the restaurants, to tell him that they could not deliver because of the pickets (R. 68-69). On one occasion Grisinger had to pick up needed supplies in his own car (R. 69). Edward Graham, an employee of Grisinger's Fourth Street restaurant, testified that drivers of other suppliers were also deterred by the sight of the picket line, left without making delivery, and checked with their unions before returning to deliver their orders (R. 16; Tr. 141).⁴

⁴ At Tr. 141, inadvertently omitted from the printed record, Graham testified on cross-examination:

A. Let's see, the bread man and the milk company didn't deliver the first time. They went away and then they went and called their union to find out if it was all

II. The Board's Conclusions and Order

Upon the foregoing facts the Board found that, by picketing entrances used by deliverymen and restaurant employees as well as restaurant customers, the Unions induced or encouraged not only the customers but also employees of the restaurants and of the restaurants' suppliers not to cross the picket line. The Board further found that such a response by the employees constituted a concerted refusal to work within the meaning of Section 8 (b) (4) (A) of the Act. As the object of the picketing was proscribed by Section 8 (b) (4) (A)—namely, forcing the restaurants to stop doing business with Southern—the Board concluded that by inducing or encouraging such action by the employees, the Unions violated Section 8 (b) (4) (A) (R. 21-24).⁵

Accordingly, the Board ordered respondents to cease and desist from engaging in the unfair labor practices found and to post appropriate notices (R. 24-28).

right to deliver, and then they came back and made the delivery, but they were late on their delivery.

Q. And those drivers told you, did they not, on checking with their union, they found it was all right to go through the picket line?

A. Yes.

⁵ The Board's application for injunctive relief against respondents, based on the foregoing facts, was denied by District Judge Byrne, who found there was no evidence that the picketing affected any employees. For the reasons indicated in the Argument, we respectfully submit that the district court erred.

ARGUMENT

Introduction

This case involves the so-called "secondary boycott" provisions of the Act by which Congress sought the objective "of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B. v. Denver Building Trades Council*, 341 U.S. 675, 692. The respondents here were engaged in a "secondary boycott." In other words, their controversy was with Southern, but they brought pressure on unoffending employers (the restaurants), attempting to disrupt the restaurants' business unless the restaurants ceased doing business with Southern. Respondents contend, however, that their secondary boycott did not violate the letter of the law. They point out that in legislating against secondary boycotts Congress outlawed only appeals to employees and did not proscribe appeals to customers not to cross a picket line. The Board found on the record in this case, however, that respondents, by picketing entrances used not only by customers but also by employees,⁶ necessarily appealed not to the customers alone but also to employees of the restaurants and to employees of suppliers delivering goods to the restaurants. In the following pages we shall show that the Board's analysis of the situation is correct, and that its finding is supported by substantial evidence on the record as a whole.

⁶ The entrances in question were used by employees of the restaurants and by employees delivering goods to the restaurant. Appeals to either class of employees in the course of a secondary boycott are proscribed by Section 8 (b) (4) (A) of the Act.

THE BOARD PROPERLY HELD ON THE RECORD IN THIS CASE THAT THE UNIONS, BY ENGAGING IN SECONDARY PICKETING AT ENTRANCES USED BY EMPLOYEES AS WELL AS BY CUSTOMERS, INDUCED OR ENCOURAGED EMPLOYEES NOT TO CROSS THE PICKET LINE, THEREBY VIOLATING SECTION 8 (b) (4) (A)

Respondents' basic purpose was to unionize Southern. The technique involved was simple and traditional. Having failed in their direct approach to Southern and its employees, respondents sought to attack Southern by disrupting the business of its customers, the restaurants. Respondents' plan was that the restaurants, to rid themselves of the pickets, would cease doing business with Southern unless Southern came to terms with the Union.

The keystone to this campaign, of course, is the disruption of the restaurants' business by placing pickets at the restaurants. The Taft-Hartley Act aside, the Unions are not concerned with how this disruption takes place. That is to say, the Unions' purpose will be achieved if employees of the restaurants' suppliers refuse to deliver supplies through the picket line, or if customers who would otherwise patronize the restaurants take their trade elsewhere. When a secondary picket line is placed at an entrance used alike by customers, employees, and deliverymen, its normal appeal (and, at least prior to the Taft-Hartley Act, its intended appeal) is to all alike—do not cross the picket line, and thereby help us to disrupt this business so that its owner will bring pressure on the employer with whom we have a dispute.

That such a picket line ordinarily conveys this message to employees who approach it is an elemen-

tary fact of business and industrial life. As this Court stated in *Printing Specialties Union v. N.L.R.B.*, 171 F. 2d 331, 334, petition for certiorari dismissed, 336 U.S. 949:

The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn cooperate if need arises. The converse, likewise, is implicit. "Respect our picket line and we will respect yours."

The understanding of organized labor as to the meaning of a picket line was well expressed by the *Report of the General Executive Board to the 27th Convention, International Ladies' Garment Workers Union*, Atlantic City, N. J., May 23—June 1, 1950, pp. 691-692:

Your committee is keenly aware of the great role that respect for a picket line has placed in the history of the labor movement. It is a tradition that emerged with the very first beginnings of labor organization and that has done much to foster the spirit of labor solidarity, which alone gives trade unionism whatever power it possesses. Respect for a picket line still remains a sacred and inviolable sentiment among the best of the many millions of men and women who make up the army of organized labor. It constitutes a weapon and a sanction that labor can never outgrow since it can never outgrow the idea and practice of labor solidarity that gives it its life.

The Taft-Hartley Act, as we have seen, drew a line between secondary picketing which appeals to patrons of the picketed premises, and secondary picketing

which appeals to employees. But the Act did not operate to remove from the consciousness of organized labor this "inviolable sentiment" to respect a picket line. When the Unions in this case placed a picket line at entrances used by employees as well as patrons, the message automatically conveyed to the employees was "do not cross this picket line." Even assuming, *arguendo*, that the picketing Unions were aiming also at restaurant patrons, the fact remains that the presence of a picket at an entrance used by employees constitutes a strong form of inducement or encouragement to those employees to refuse to enter the picketed premises.

Moreover, the picket lines in this case did nothing to dispel this normal appeal to employees. Although respondents proclaim that this was mere customer picketing, the signs made no appeal, and suggested no course of action, limited to potential customers. In fact, there was no indication from the signs that employees were *not* being encouraged to strike. Cf. *N.L.R.B. v. Associated Musicians*, 226 F. 2d 900, 904 (C.A. 2), certiorari denied, 351 U.S. 962; *Stover Steel Service v. N.L.R.B.*, 219 F. 2d 879, 880 (C.A. 4). In all outward appearance the picketing here was indistinguishable from a conventional union picket line which has as its purpose a broad appeal to *all* who approach—customers and employees—to assist the picketing union by not crossing the picket lines. That employees as well as customers might respond to the appeal of such picketing is more than merely conjectural.

Attesting to the correctness of the Board's finding

in this case is the effect such picketing actually had on employees. Thus, Driver Russell changed his method of delivery to avoid crossing the picket line. Driver Schaefer, after trying in vain to elicit from the picket the reason for the picketing, returned his merchandise to the truck and refused to make the delivery rather than chance crossing the picket line. Moreover, another deliveryman warned Russell of the possibility of a union fine for crossing the line. Other incidents of deliveries skipped because of the picket line were related by Edward Graham, a cook at Grisinger's Fourth Street Restaurant. Further indicating the effect of the picketing on neutral employees was the refusal by Douglas Brothers to make further deliveries to Madsen's restaurant on the ground that its drivers were union members who did not want to cross the picket line.

Insofar as these and other employees respected the picket line, the purpose of the picketing—the disruption of the restaurants' business to force the restaurants to bring pressure on Southern—was advanced. To be sure, where employees who refused to cross the picket line made specific inquiry of the pickets as to whether the picketing was aimed at them, the pickets, under instructions from the Unions, refrained from answering in any way. Instead, the inquirer was handed a card bearing the telephone number of Mr. Leggieri, the Unions' representative in charge of the picketing. The Unions—mindful of the statutory restriction—testified that anyone calling that number would be informed that the picketing was merely a consumer appeal (R. 96-98). The record reveals,

however, that no one identified as an employee ever took the trouble to call the number listed on the card (R. 98). Employees faced with the picket lines either called their own unions or employers or, as indicated above, merely refrained from crossing the lines. This, we submit, falls far short of the Unions' statutory duty to refrain from inducing or encouraging employees to respect the secondary picket line.

We submit, in short, that the "foreseeable consequence" of picketing at an entrance used in part by employees is that the employees will respect the picket line. No doubt another consequence under these circumstances is that customers will also respect the picket line. But the legality of the second consequence does not excuse the illegality of the first. Cf. Judge Learned Hand's observation for the court in *N.L.R.B. v. Remington Rand, Inc.*, 94 F. 2d 862, 872 (C.A. 2), certiorari denied, 304 U.S. 576, that "it rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune."⁴

The foregoing considerations find ample support in the court decisions construing the secondary boycott provisions of the Act with respect to so-called

⁴ *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 44-46.

⁵ The instant case is to be distinguished from *Capital Service, Inc. v. N.L.R.B.*, 204 F. 2d 848 (C.A. 9), affirmed 347 U.S. 501, where the picketing of customer entrances was considered by the Court to be violative of Section 8 (b) (1). That picketing was not held violative of Section 8(b)(4) because in that case there was no evidence that picketing at those entrances had any impact on the employees or that employees used those entrances. See 100 NLRB at 1093.

“consumer picketing.” Thus in *N.L.R.B. v. Business Mach. & Office Appliance, etc.*, 228 F. 2d 553, 560 (C.A. 2), certiorari denied, 351 U.S. 962, the court, although holding the “customer” picketing lawful, expressly noted that “it was not shown that the picketing had any tendency to induce the employees to strike or cease performing services,” and that the office employees who approached the picket lines in that case (unlike the Long Beach deliverymen in this case) were not unionized. In *N.L.R.B. v. Associated Musicians*, 226 F. 2d 900, 904-905 (C.A. 2), certiorari denied, 351 U.S. 962, the court held the picketing unlawful even though, as here, it was timed to coincide with the arrival of patrons rather than employees, and even though the picketing did not result in an actual strike or concerted refusal to work. In *Brewery and Beverage Drivers v. N.L.R.B.*, 220 F. 2d 380 (C.A. D.C.), the court approved the Board’s finding of violation where the union, as here, picketed in front of retail store entrances used by customers and deliverymen alike, carrying signs far more specifically directed to the consumer than those in the instant case. 107 NLRB 299, 301, 304.⁹

The decisions of this and other courts construing the secondary boycott provisions in so-called “com-

⁹ The signs in that case read (107 NLRB at 301):

Friends

When you go into this store do not ask for
Coca Cola

It is not delivered by members of Brewery and Beverage Workers Union No. 67, thus tending to decrease the earning opportunities of its members. If you desire a Cola drink, please select some other brand * * *.

mon situs" cases likewise demonstrate the validity of the Board's holding here. In the "common situs" cases pickets are stationed at premises where both the employer with whom the Union has a labor dispute (the primary employer) and other employers are doing business. The issue in those cases is whether the object of the picketing is defined with sufficient clarity to make it appear that its impact is on the primary employer (and hence lawful) and not on employees of the secondary employer (which would be unlawful). In the instant case, of course, the picketing is purely "secondary," but the issue is similar: Was it conducted so as to limit its effect to customers and not to reach employees? In determining whether the picketing was sufficiently limited in the "common situs" cases, the courts have recognized that the Board may properly consider "the failure of the Union to inform striking employees of neutral employers that the picket line was not aimed at those employers" (*Truck Drivers Union v. N.L.R.B.*, 249 F. 2d 512, 514-515 (C.A.D.C.)), or (to quote this Court) the failure of the union to "limit" or "minimize the impact of its picketing" (*Retail Clerks Union v. N.L.R.B.*, 249 F. 2d 591, 598).

In short, the "common situs" cases hold that where a union's picketing may have both primary and secondary impact, the union is under a duty to limit the effect of its picketing. This analysis must apply *a fortiori* to the instant case where the picketing is entirely of a secondary nature. Where a union deliberately engaged in a secondary boycott, and installs a picket line which by its very presence appeals to em-

ployees as well as customers, the union must take affirmative steps to limit the impact of its picketing. In this case not only were the pickets and picket signs unrevealing (*supra*, pp. 13-15) but, in addition, the Unions took no steps to limit the appeal of the picket line. They distributed no literature advising employees that they were free to cross the picket line.¹⁰ They issued no instructions to pickets that the picketing was directed only at customers. They did not even authorize pickets to answer questions from employees who inquired whether they would be penalized if they passed through the lines. Instead the Unions placed the pickets and let the picket line have its normal and foreseeable consequences. Only when employees took the pains of making a special telephone call were they advised that they need not respect the picket line.¹¹

It may well be that the Unions determined to picket at meal times and during the period of the labor convention so that the picketing would have the greatest possible impact upon the restaurants' patrons. Actually, the presence of the convention suggests that other means were readily available to accomplish the Unions' legitimate objective of appealing to custom-

¹⁰ Cf. *N.L.R.B. v. General Drivers, etc.*, 225 F. 2d 205, 207-208, 211 (C.A. 5), certiorari denied, 350 U.S. 914, where the union added the notation "see our pamphlet" to its picket signs and distributed handbills to employees expressly stating the purpose of its picketing.

¹¹ Any other response, of course, would have constituted that "direct evidence of a purpose to violate the statute" which is so "rarely obtainable." *N.L.R.B. v. Int'l Union of Operating Engineers*, 216 F. 2d 161, 164 (C.A. 8).

ers. The Unions could have distributed handbills and otherwise publicized their boycott to the convention delegates.¹² But the mere fact that the picketing may have had a lawful objective or result will not save it from illegality if one of its foreseeable consequences was unlawful.

A picket line, by its very presence at a door used alike by customers and employees, induces or encourages a response from both customers and employees. The response it normally induces is not a telephone call to the office of the union doing the picketing, but a simple refusal to cross the picket line. Where, as here, the picketing is part of a secondary boycott, inducing such a response from employees is unlawful.¹³

¹² The Unions did distribute thousands of window cards to firms using linen services and notified visiting labor delegates to patronize only those establishments with such a card (R. 35-36).

¹³ The Unions suggest that the appeal of the picket line is to individuals as they approach it, and that the picketing therefore did not induce or encourage a "concerted refusal" within the meaning of the Act, citing *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665, 670-671. If this argument were valid, virtually all secondary picketing would be legitimized even at employee entrances, because it appeals to each individual in turn as he approaches the picket line. The basic purpose of a picket line is to appeal to labor as a class (*supra*, p. 12). The employees who respect a picket line are acting in concert with the pickets and with each other. The *Rice Milling* case concerned lawful primary picketing. As the court stated in *Amalgamated Meat Cutters v. N.L.R.B.*, 237 F. 2d 20, 24 (C.A.D.C.), certiorari denied, 352 U.S. 1015:

It would be artificial to say that the Union did not encourage a unity of effort, and therefore, concerted

We submit that the Unions in this case did not take sufficient steps "to disentangle [that] consequence for which [they are] chargeable from those from which [they are] immune" (*Remington Rand, supra*, p. 15).

CONCLUSION

For the foregoing reasons, we respectfully submit that a decree should be entered enforcing the Board's order in full.

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JULY 1958.

action, on the part of the employees. We think this type of inducement is designed to secure concerted conduct and does not fall within the scope of the *Rice Milling* decision (citing authorities).

APPENDIX

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U.S.C., Secs. 151, *et seq.*), is as follows:

UNFAIR LABOR PRACTICES

* * * *

Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . .

No. 15947.

IN THE

United States Court of Appeals FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LAWBERT, LINEN SUPPLY & DRY CLEANING DRIVERS
LOCAL NO. 928, AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMERICA, AND LOCAL NO.
52, LAWBERT & DRY CLEANING WORKERS INTERNA-
TIONAL, AFL-CIO,

Respondents.

On Petition for Enforcement of an Order of the National
Labor Relations Board.

BRIEF FOR RESPONDENTS.

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FILED

SEP 17 1958

PAUL P. O'BRIEN, CLERK



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No. 15,947.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LAUNDRY, LINEN SUPPLY & DRY CLEANING DRIVERS
LOCAL No. 928, Affiliated With INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMERICA, AND LOCAL No.
52, LAUNDRY & DRY CLEANING WORKERS INTERNA-
TIONAL, AFL-CIO,

Respondents.

On Petition for Enforcement of an Order of the National
Labor Relations Board.

BRIEF FOR RESPONDENTS.

Statement of the Case.

Southern Service Company, Ltd., herein called Southern, is a California corporation, operating approximately 30 laundries throughout California, including one in Long Beach called Long Beach Linen Supply. Both respondents are labor organizations, and are engaged in transacting business and in promoting and protecting the interests of their employee, members. Upon a charge filed on behalf of Southern, on August 16, 1956, the General

Counsel of the National Labor Relations Board issued his complaint against respondents alleging that they had violated and were violating Section 8(b)(4)(A) and (B) of the National Labor Relations Act, 61 Stat. 136, 29 U. S. C., Sec. 151, herein called the Act.¹

The complaint alleged that for a period in August, 1956, and since October 8th of that year, the Respondents, by means of picketing, had induced and encouraged employees of customers of Southern and of suppliers to those customers, to engage in strikes, or concerted refusals in the course of their employment, to perform services for their respective employers, with the object of forcing and requiring such customers to cease using the services of Southern and to cease doing business with Southern, and to force or require Southern to recognize or bargain with the Respondents as collective bargaining representatives of certain of Southern's employees, although neither Respondent had been certified as such representative pursuant to Section 9 of the Act. [R. 5-6.]

The Board's application for injunctive relief under Section 10(1) of the Act was denied by District Judge William Byrne on December 3, 1956. At this hearing, all parties were represented, and were permitted to examine and cross-examine witnesses, and to offer evidence pertinent to the issues. The District Court's decision was based on the finding that the Respondents confined the appeal of their picketing to the customers and patrons of Southern's customers, and that no effort was made by the Respondent Unions to induce or encourage employees of any employer to cease work or refuse to handle or deliver any mer-

¹References to pages of the printed record are designated "R." and to the official transcript, "Tr."

chandise.² At the hearing before the Trial Examiner, all parties stipulated that the transcript of testimony and exhibits offered and received in the Section 10(1) hearing would constitute the entire record in the Board case. The Trial Examiner found that the Respondents had not violated Section 8(b)(4)(A) or (B). The Board, while adopting the Trial Examiner's findings of fact concluded that the conduct involved was violative of Section 8(b)(4)(A).

The Board's Findings of Fact.

The following facts appear from the findings of the Trial Examiner and the uncontradicted supporting evidence. There was no conflict in the testimony.

For a number of years the Respondents had made unsuccessful attempts to organize employees of Southern, but at the time of the picketing, described herein, no recent demand for recognition had been made upon Southern.

Learning in late spring or early summer of 1956 that the State convention of the American Federation of Labor was scheduled to be held in Long Beach, the Respondents protested to the Central Labor Council in Long Beach that such a gathering of Union officials would result in a substantial increase of business to restaurants in the area which were using the nonunion linen supply service of Southern. [Tr. 44.] When their protests did not succeed in having the convention moved to another city, the Respondents told officials of other labor organizations that for the period of the convention pickets would be placed outside some or all restaurants in the area using South-

²This decision is fully reported in 39 LRRM 2381.

ern's linen service to advertise that fact and thus to encourage the visiting Union representatives to refrain from patronizing such restaurants. It was made clear to these officials that Respondents did not desire the restaurant employees to engage in work stoppages. [Tr. 46.] These union officials in turn conveyed this information to their members employed by the restaurants to be picketed. In the meantime efforts were made to persuade Long Beach restaurants to switch their custom to linen service companies employing members of the Respondent unions. Representatives of Respondents explained to the restaurant owners that an advertising picket line would be set up to divert customer patronage to restaurants using a unionized laundry.

In this regard, Respondents made it clear that the picket lines were to be directed solely to the consuming public and more specifically to the visiting Union delegates, and were not in any way directed to the employees of the restaurants or of suppliers doing business with the restaurants. [Tr. 75.] The Respondents stated that they were not interested in causing a strike of the restaurant employees or of causing any delay or stoppage of shipments to or from the restaurants. [Tr. 78-81, Resp. Exs. E and F.] The restaurant owners clearly understood this through their conversations with representatives of Respondents and with representatives of the Unions to whom their own employees belonged. Following conversations with Respondents, the restaurant association published ads in the local newspapers informing the public that they were not involved in any dispute with their own employees. The

restaurants also called supplier firms and informed them that the picket lines were not intended to dissuade employees from making deliveries, but were directed exclusively to the consuming public in an effort to divert patronage. [Tr. 76-77.]

For the period of the convention, August 13 through 18, 1956, pickets were placed outside the customers' entrances of about 15 Long Beach restaurants. The pickets each carried the following sign:

"NOTICE TO THE PUBLIC. THIS ESTABLISHMENT'S LINENS ARE BEING PROCESSED BY A NONUNION LAUNDRY."

All but four of the restaurants picketed had a separate entrance for employees and suppliers. No pickets were placed at these entrances used by employees rather than patrons. [R. 14.] On August 20, 1956, a representative of Respondents wrote to the owner of Madsen's restaurants and informed him that a campaign was being carried on to increase the patronage of laundry and linen supply service companies whose employees were unionized, and that the Respondents would continue picketing Madsen's for this purpose. He reiterated that Respondents did not desire any work stoppage on the part of the restaurant employees or by employees of supplier firms. [Resp. Ex. "E."] This was followed by a second letter dated August 27, 1956, again calling attention to the limited purpose of the picketing and inviting Madsen's to show the letter to its employees and to employees of supplier firms in order that any possibility of work stoppages or delays be elimi-

nated. [Resp. Ex. "F" Tr. 81.] On October 8, 1956, picketing again resumed at Madsen's restaurant.

At the four restaurants mentioned in the complaint, namely, Madsen's, Grisinger's Drive-Ins, and Jack's Corsican Room, picketing took place only during those hours when business was at its height—at usual meal times. No picketing was done at the earlier hours when employees of the restaurants were reporting for work. [R. 15, Tr. 83, 84.] Since deliveries were received at uncertain hours, there were occasions when employees of suppliers approached the restaurants at a time when pickets were present. At all but the above named restaurants there were separate entrances for employees and customers and, in these cases, pickets at no time appeared at the employee entrances. [R. 14.]

1. *The picketing at Madsen's restaurant.*

The customer entrance borders on the corner of American and Ocean Avenue. Employees of the restaurant also use this entrance and some small parcels are delivered through there. On the American Avenue side, there is a sidewalk chute through which large deliveries are made. There is also on American Avenue a door which is kept locked all of the time. From August 15 to 18, pickets patrolled the length of the restaurant on American and Ocean Avenue and walked over the sidewalk chute. When the one-man picket line resumed on October 8, 1958, the picket did not walk over the chute, but patrolled on the sidewalk between the chute and the curb. The Ocean-American entrance and the sidewalk chute are the only means of in-

gress and egress in use. The restaurant is located one block from where the Union convention was held. [Tr. 56-58, 61, 72.] None of the Madsen employees left work as a result of the picket line. When these employees made inquiries as to the nature of the picket line, the restaurant owner informed them in light of his conversations with representatives of Respondents and other unions, that the line did not effect them. [Tr. 81, 82.] On the first day of picketing Harley Schaefer, an employee of an ice cream company, was preparing to make a delivery at Madsen's when a driver for a bakery company volunteered the opinion that Schaefer might be fined by his Union if he did so. On the sole basis of this statement, he failed to make delivery that day. Later that same day his company informed him that the picket line was not designed to stop deliveries. At no time did any picket nor any union agent instruct him not to make deliveries. [Tr. 155.] A few days later, he commenced making his regular deliveries despite the existence of the picket line. [Tr. 155.] Outside of this one incident, the record is void of any further instances when deliveries were delayed to any degree because of the picket line.

2. *Picketing at the Grisinger Drive-In restaurants.*

The two Grisinger restaurants are located at 4930 Atlantic Boulevard and 1632 East Fourth Street, both in the City of Long Beach. The Fourth Street restaurant is about one mile, and the Atlantic Avenue restaurant is 5 or 6 miles from the convention hall. [R. 13, Tr. 136.] The entrances to both restaurants are used by em-

ployees and customers alike. A single picket patrolled solely at such entrances. Allan Russell, a driver for a meat company, drove around to a rear alley and signalled the cook, who came to the truck to get the meat. There were no pickets at the rear of the restaurant or of the alley. [Tr. 139.] Russell made no inquiry concerning the picket line, and was never advised whether or not to cross it. However, had he asked either his Union, employer or Grisinger's representative, he would have been informed that the picket line was not intended to interfere with deliveries. [R. 16, Tr. 147.] Edward Graham, an employee of Grisinger's, testified that from reading the picket sign, he was of the belief that he was not being asked to refuse to perform work. In this connection he testified that he believed if the Union wanted him to cease work, he would have been so informed. [Tr. 140.] Graham testified that outside of the Russell incident, a breadman and milkman delayed making delivery until they contacted their Union, and when informed they could do so, they returned the same day and made delivery. [Tr. 141, R. 16.] Beside these three incidents all deliveries were made normally. None of the employees of the restaurants failed to report for work or failed in any respect to perform duties for their employer because of the picketing. [R. 16.]

ARGUMENT.

In the Absence of Proof by Substantial Evidence That Respondents Induced or Encouraged Employees to Engage in Work Stoppages, It Is Mandatory to Conclude That Respondents Did Not Violate Section 8(b)(4)(A) of the Act.

The National Labor Relations Act did not make unlawful all picketing at secondary premises. Requests and inducements addressed directly to secondary employers are not violative of the Act. *Rabouin v. N. L. R. B.*, 195 F. 2d 906, 911-912; *N. L. R. B. v. Associated Musicians of Greater New York, Local 802*, 226 F. 2d 900. Picketing inducing customers to withhold their patronage from neutral concerns in order to cause a cessation of dealings between the neutral and primary disputant are lawful. *N. L. R. B. v. Service Trade, Chauffeurs, Salesmen & Helpers, Local 145*, 191 F. 2d 68; *N. L. R. B. v. Electrical Workers, CIO*, 228 F. 2d 553; *Capital Service v. N. L. R. B.*, 204 F. 2d 848. The only activity proscribed by Section 8(b)(4) is inducement or encouragement of the *employees* of secondary concerns or of the suppliers thereof. If the activities in question do not violate the *express prohibition* of Section 8(b)(4), then they are lawful and protected within the meaning of Section 7 of the Act. *Garner v. Teamsters*, 346 U. S. 485; *Weber v. Anheuser-Busch*, 348 U. S. 468.

The sole question involved in this case is whether the Respondents by engaging in peaceful picketing at Mad-sen's, Grisinger's and Jack's Corsican Room, induced or encouraged the *employees* of any employer to engage in a *concerted refusal* to perform work at these restaurants. Since the record is barren of any evidence of work stoppages or inducement or encouragement thereof as to the

employees of the restaurants above named, this inquiry is limited as to employees of suppliers of the restaurants.

The Board has the burden to support its findings of fact and findings based on factual inferences by substantial evidence in the light of the whole record. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474. Having found the facts, the Board must correctly interpret the Federal Act. Netterville, Administrative "Questions of Law" and the Scope of Judicial Review in California, 29 So. Cal. L. Rev. 434, 464. It is clear that unless the evidence supporting the Board's decision in the instant case is substantial, this Court is fully empowered to set it aside. As the Supreme Court stated in *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 488:

"Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence, opposed to the Board's view."

The *Universal Camera* case similarly makes it clear that the decision of the Trial Examiner is afforded great weight in considering whether the evidence in support of the Board's decision is substantial. In this connection, the Court states at page 496:

". . . evidence supporting a conclusion may be *less substantial* when an impartial experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." (Emphasis added.)

It is solely the facts and reasonable inferences based thereon that determine whether the Board's decision can stand.

The Evidence When Considered as a Whole Makes It Clear That the Picketing by Respondents Was Clearly and Unequivocally Addressed to Customers of the Restaurants and Therefore Did Not Violate Section 8(b)(4) of the Act.

It is of major importance to note the basis upon which the Board differed in its conclusions from those reached by the Trial Examiner. In this connection the Board adopted the Trial Examiner's findings of fact [R. 20] but bottomed its decision solely on the inference that the mere existence of the picket line would have a natural effect of inducing and encouraging employees not to work behind it. [R. 22.] The Board in its decision completely disregarded the following undisputed findings of fact previously referred to:

- (1) Prior to the commencement of any picketing, Respondents informed the Unions whose members were employed at the restaurants that the economic activities would be directed solely to customers of the restaurants and that it was not the desire of Respondents to cause work stoppages by the employees.
- (2) Prior to the picketing, the Respondents so informed the restaurant owners and invited them to make this clear to their employees, suppliers and employees thereof.
- (3) Outside of the four restaurants having common employer-customer entrances, all other picketed restaurants had separate means of ingress and

egress for employees and none of these entrances were picketed.

- (4) At the four restaurants having common entrances, it was impossible to appeal to patrons without crossing these entrances.
- (5) The legend on the picket banner was clearly and unequivocally directed solely to the patrons of the restaurants.
- (6) Neither the Respondents, nor anyone authorized to speak for them, ever requested or intimated in any manner that employees of the restaurants or suppliers thereof should not continue to perform services for the restaurants.
- (7) Outside of four incidents involving deliverymen, all services performed for and deliveries to the restaurants continued in a normal and customary manner during the period of the picketing.
- (8) Of these four incidents, one driver, Harley Schaefer, and two unidentified drivers delayed making deliveries only until confirming through their respective Unions that it was proper to do so. The fourth, Allan Russell, never made inquiries of anyone, but made his deliveries without any interference through the rear entrance.
- (9) The timing of the picketing substantially coincided with the presence in the area of a large number of union-minded restaurant patrons.

These clear undisputed facts establish that the Respondents took reasonable steps to limit the effect of their picketing to customers and avoid causing work stoppages by employees. On the basis of these facts, both the District Court judge in the Section 10(1) hearing and the

Trial Examiner in the Board hearing concluded that Respondents' picketing was lawful. The General Counsel in seeking enforcement of the Board order in effect urges adoption of the proposition that any and all secondary picketing is *per se* violative of the Act if the picket line *can be seen* by employees performing services for or making deliveries to the secondary employer. Such a proposition totally unsupported by any authority would for all practical purposes effect a blanket prohibition against all secondary picketing.

Case law on this subject is completely opposed to the extreme proposition urged by the General Counsel. The main factual points relied upon by the General Counsel in support thereof have been totally rejected in several well reasoned decisions. These points can be briefly stated as follows:

1. Respondents' picketing at four entrances occurred at entrances used by customers and employees.
2. Four incidents occurred wherein delivery employees delayed going through the picket lines until contacting their Unions.
3. The mere presence of a picket line has the natural effect of inducing work stoppages.

(a) Incidental Picketing at Common Entrances.

In *N. L. R. B. v. Electrical Workers CIO*, 228 F. 2d 553 (1955), cert. den. 100 L. Ed. 698, the Second Circuit was faced with a factual situation closely similar to that in the instant case. In that case, a struck typewriter manufacturer farmed out his repair work to independent repair companies. The Union engaged in picketing at the situs of the repair concerns and also at the premises of substantial customers of the struck manufacturer. The

Board prosecuted on the theory of Section 8(b)(4)(A), both as to the repair concerns and the customers. The repair concern picketing was held not violative of the Act on the basis of "alleged doctrine." The picketing at customer premises which concededly was for the purpose of causing a cessation of dealings with the manufacturer was carried on at entrances used in common by the public, employees of the secondary customers and deliverymen. As in the instant case, the picketing at entrances used by employees and customers alike was confined to premises which did not have separate employee entrances. The picketing was carried on during ordinary business hours and during the time when some employees went to lunch. In at least one instance, picketing began before the start of employee working hours. The Court stressed the fact that none of the employees of the secondary concerns, as here, engaged in work stoppages and stated that since there was

" . . . neither intent to induce, nor effective inducement, nor even probable inducement of employees, we conclude that there is no substantial evidence to support the Board's finding of unlawful inducement an encouragement of employees in violation of Section 8(b)(4)(A)."

Significantly, the place, manner of picketing and placard legend utilized were substantially identical to that employed in the instant case.

A closely analogous factual situation was considered by the Fifth Circuit in *N. L. R. B. v. General Drivers, Warehousemen & Helpers, Local 968, etc., et al.*, 225 F. 2d 205 (1955). In that case the primary employer was a subcontractor at various locations, and his employees worked alongside those of neutral subcontractors. The

Union picketed at the various job sites after its request for permission to enter the premises and picket close to the primary disputant's employees was denied by the general contractor. As a result of the picketing, some employees of neutrals engaged in work stoppages. The Board contended that since the primary disputant had a warehouse several miles from the job sites, the Union's decision to picket at the job sites gave rise to an inference that its purpose, partly at least, was to induce employees of neutrals. The Court, in rejecting this argument, stated at page 209:

“Irrespective of the Board formulated ‘situs’ theory, however, we think such peaceful picketing upon common premises directed solely against the primary employer with whom a labor dispute exists, is still lawful under the Act, *and that any adverse effect upon secondary, neutral employees must necessarily be viewed as incidental to the lawful exercise of that statutory right.*” (Emphasis added.)

By direct analogy to the instance case where incidental picketing occurred at customer-employee entrances, the Court stated:

“Futhermore, it is practically without dispute that the pickets appeared after the men had began work, and located themselves *as close as possible* to the place where the Otis Massey craftsmen were engaged in the normal business of that company.” (Emphasis added.)

The analogy of these cases to the instant factual situation is patent. Where, as in the instant case, the Union engages in picketing at a secondary situs, regardless of whether employees of the primary disputant also are located there, the test of lawfulness is whether the Union

conducts the picketing in such manner as to make it reasonably apparent under the circumstances that the purpose and the effect is not to induce or encourage employees of neutrals. Whereas evidence as to *concerted* work stoppages is relevant in determining the Union's intent, incidental isolated instances of work stoppages such as involved in *General Drivers* and isolated instances of mere delay by individuals as involved in the instant case do not render the Union's conduct unlawful if the over-all method of carrying on the activities is not proscribed by the Act.

(b) Four Incidents of Delay in Delivery.

It should be recalled that the picketing at 15 restaurants brought about a delay in deliveries in only four instances, and further, that none of the restaurant employees engaged in work stoppages. This situation is analogous to that involved in *N. L. R. B. v. International Rice Milling Co.*, 341 U. S. 665. In that case the Board prosecuted a Section 8(b)(4)(A) charge on the basis of an incident occurring when two employees of a neutral customer attempted to cross the picket line. The pickets used force to prevent the neutral employees from entering the premises of the primary employer. The Court assumed that this incident induced and encouraged the two employees to engage in a work stoppage for the proscribed unlawful objective. In concluding that the inducement and encouragement did not amount to "concerted activity" within the meaning of the Act, the Court said:

"While each case must be considered in the light of its surrounding circumstances, yet the applicable proscriptions of Sec. 8(b)(4) are expressly limited to the inducement or encouragement of *concerted* conduct by the employees of the neutral employer. That language contemplates inducement or encouragement

to some concert of action greater than is evidenced by the picket's request to a driver of a single truck to discontinue a pending trip to a picketed mill. There were no inducements or encouragements applied elsewhere than on the picket line."

In *Operating Engineers Union*, 117 N.L.R.B. No. 166 (1957), where the Union incidentally induced one employee of a neutral employer to engage in a work stoppage, the Board, in finding the conduct did not violate Section 8(b)(4)(A) of the Act stated:

"The Board has consistently held that the inducement of only a single employee under these circumstances is not a violation of the Act."

In *N. L. R. B. v. General Drivers, Warehousemen and Helpers, Local 968, supra*, it was held that where the mode of secondary picketing was otherwise lawful, the fact that some isolated employees of neutrals ceased work did not charge the Union to the extent of rendering their conduct unlawful.

Despite the fact that Respondents are alleged to be in violation of Section 8(b)(4)(A), the original charge in this case was filed for and on behalf of Southern, the primary employer, and not the restaurants. In *N. L. R. B. v. General Drivers, Warehousemen and Helpers, Local 968, supra*, the Fifth Circuit considered this a significant factor in concluding that no violation had occurred. The Court stated at page 211:

"Of further significance is the fact that this complaint was brought at the instance of the primary employer and charging party, Otis Massey, rather than on behalf of any adversely affected secondary and neutral employers."

It is clear that the mere fact of isolated instances of delays in delivery are not “concerted” action within the meaning of Section 8(b)(4)(A) and by themselves do not affect the validity of Respondents’ conduct.

Picket Line as Inducing Work Stoppages.

The General Counsel on pages 11-15 of his brief contends that the very presence of the picket line instills in organized labor an “inviolable sentiment” to respect it, that this “sentiment” itself is strong inducement and encouragement to employees, and therefore that Respondents owed a duty to proclaim in their banners that employees should not respect the picket line. On the basis of this *ex cathedra* pronouncement as to the abstract effect of a picket line on employees, the General Counsel asserts that the Board was correct in ruling that the Respondents as alleged in the complaint [R. 5-6] engaged in

“ . . . inducement or encouragement of *employees* of customers of Southern . . . and of their suppliers, shippers, wholesalers, transportation and delivery companies, to engage in strikes or *concerted refusals* to perform services for their respective employers. . . .” (Emphasis added.)

It has been clearly held that although the Board can draw reasonable inferences from facts, there must be a substantial basis to support the inferences. The Board cannot create presumptions to take the place of evidence. In *N. L. R. B. v. General Drivers, Warehousemen & Helpers, Local 968*, *supra*, the Court said:

“While the drawing of appropriate inferences as to the unlawfulness of objective and motive in a labor dispute is primarily the province of the Board,

there still must be some substantial basis for inferring a wrongful rather than a legitimate motive." (Emphasis added.)

In *N. L. R. B. v. Houston Chronicle Pub. Co.*, 211 F. 2d 848, 854, the Fifth Circuit Court appropriately stated:

"When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the Respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove."

A further limitation on the Boards' power to raise presumptions to satisfy its burden of proof is set forth in *Universal Camera Corp. v. N. L. R. B.*, *supra*. The Supreme Court therein clearly states that a reviewing court must consider all evidence which mitigates against the facts and inferences found by the Board. In this connection, the Court stated at page 488:

"The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

The courts have in numerous occasions rejected the Board's inference that the mere presence of a picket line serves to induce and encourage employees.

In *N. L. R. B. v. Electrical Workers CIO*, *supra*, the Court, in rejecting this contention, stated:

"It cannot be assumed that a picket line will prevent even unionized employees from crossing it *when the Union apparently intends that they shall cross and takes steps to make its intent plain.*" (Emphasis added.)

The Court continues:

“Even the testimony of representatives of the picketed firms indicates that they had no fear that their employees would take any action to coerce them regarding their business with Royal. Their only fear seemed to be possible public embarrassment. Such embarrassment and persuasion the Union is privileged to pursue. *If on this evidence we were to grant the Board’s petition with respect to the customer picketing, we would, as a practical matter, come very close to condemning all customer picketing. Clearly this is not the purpose of the Act.*” (Emphasis added.)

In *Douds v. Bakery Workers Union*, 224 F. 2d 49 (1955), the Second Circuit rejected the Board’s contention that a picket line *inherently* encourages employees not to work behind it. In this case none of the delivery employees refused to cross the line. The Court said:

“If the appellee is to be ‘presumed’ to intend the consequences which follow from its conduct, the inference to be drawn is that Local 50 did not intend to influence the employees of Arnold to cease work.”

The court then proceeds to stress the varying methods of inducing employees, none of which were followed by the Union in that or the instant case. In this connection, the Court states:

“The trucks were operated by members of AFL unions affiliated with the appellee. Had appellee intended to induce the drivers to engage in a concerted refusal to transport Arnold’s bread, an effective means to accomplish it was available through actions by these affiliated unions. But the testimony does not even suggest that any effort was made to induce

them to act. Nor was any threat made or inducement offered to any employee of Arnold or of any other employee.”

In *Crowley's Milk Company*, 102 N.L.R.B. No. 102, the Board held that conduct identical to that engaged in by Respondents did not violate Section 8(b)(4)(A), even though there were incidental work stoppages by some employees. The Board said:

“If the picketing met the criteria announced in the *Moore Dry Dock Case*, then it was not unlawful because employees of the secondary employer or employees of other employers, due to their habitual unwillingness to cross picket lines, refuse to do so, *for such effects are within the realm of the ‘incidental’.*” (Emphasis added.)

It is also of interest that the Board in the instant case failed to make *any* finding that Respondents had as their object the inducement of employees, but simply concluded from the evidence that Respondents by picketing in fact induced and encouraged employees to engage in work stoppages. [R. 23.] In *N. L. R. B. v. Electrical Workers, CIO*, *supra*, the Court faced with this situation held that in the absence of a finding as to objective, the evidence must show that

“. . . inducement was the *inevitable* result or . . . the ‘natural and probable consequence’ of the picketing”

The record here does not support either of these findings.

Conclusion.

In *N. L. R. B. v. International Rice Milling Co.*, *supra*, the Supreme Court stated:

“That Congress did not seek by Sec. 8(b)(4) to interfere with the ordinary strike has been indicated recently by this Court. This is emphasized in Sec. 13 as follows:

.

“By Sec. 13, Congress has made it clear that Sec. 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the Union’s traditional right to strike, may be so read only if such interference, impediment or diminution is ‘specifically provided for’ in the Act.”

It is clear that the Respondents’ conduct at the secondary restaurants was lawful and in accordance with their statutory right under Section 7 unless they acted for the purpose of, or the “natural and probable” or “inevitable result” of the picketing was to induce employees of the restaurants or the suppliers thereof. The undisputed evidence and findings of fact make it clear that Respondents who simply desired to appeal to customers took *every reasonable precaution* in advance of and during picketing to the end that work stoppages would not occur. In this connection, the General Counsel suggests that Respondents could have handed literature to approaching employees. The obvious answer to this is that it is not the function of the Board to erect specific patterns of lawful conduct. To do so amounts to shifting the statutory burden of proof to the respondents. *N. L. R. B. v. General Drivers, Warehousemen & Helpers, Local 968*, *supra*, at page 208. The record is undisputed that of fifteen restaurants, only four incidents of delivery delays occurred while

at the same time no incidents occurred with respect of restaurant employees. Case law is clear that picketing at customer-employee entrances will not by itself render otherwise lawful conduct unlawful. *N. L. R. B. v. Electrical Workers, CIO, supra*. Case law is equally clear that incidental hesitance by individuals to work does not constitute a "concerted refusal" within the meaning of Section 8(b)(4). *N. L. R. B. v. International Rice Milling Co., supra*. The General Counsel's position is based entirely on suppositions and presumptions which have consistently been held not sufficient in and of themselves to satisfy the Board's burden of proof. If this position is adopted, then all secondary picketing will have been effectively outlawed. Such a result is contrary to the legislative intent of the framers of the National Labor Relations Act.

It is submitted that the Board, having failed to establish by substantial evidence on the entire record that Respondents intended or acted in such manner that the natural or probable or inevitable result of the picketing was to induce or encourage employees in violation of the Act, the order of the Board's petition for enforcement should be dismissed in accordance with the Trial Examiner's recommended order.

Respectfully submitted,

STEVENSON & HACKLER,

By HERBERT M. ANSELL,

Attorneys for Respondents.

APPENDIX.

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Secs. 151, *et seq.*), is as follows:

UNFAIR LABOR PRACTICE

Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any good, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . .

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . .

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

No. 15,954 ✓

United States Court of Appeals
For the Ninth Circuit

EDWARD LEWIS SHORT,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

Upon Appeal from the District Court for the
State of Alaska, First Division.

APPELLANT'S PETITION FOR A REHEARING.

WENDELL P. KAY,

P. O. Box 1178,

Anchorage, Alaska,

*Attorney for Appellant
and Petitioner.*

FILED

OCT 27 1959

PAUL P. O'BRIEN, CLERK

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No. 15,954

United States Court of Appeals For the Ninth Circuit

EDWARD LEWIS SHORT,

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Upon Appeal from the District Court for the
State of Alaska, First Division.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Chief Judge, and to the Honorable
Associate Judges of the United States Court of
Appeals for the Ninth Circuit:*

Appellant, on the grounds following, petitions for rehearing, particularly as to that portion of the opinion of the Court dealing with the failure to endorse the names of the witnesses before the Grand Jury on the indictment.

I. THE COURT ADOPTED AN ERRONEOUS VIEW OF THE SOPER CASE.

Said the Court (p. 4):

“In *Soper v. United States*, (1955) 9 Cir., 220 F. 2d 158, only two of the many witnesses appear-

ing before the Grand Jury were endorsed on the indictment."

Not so. In *Soper* there *were* only two witnesses who appeared before the Grand Jury, and both of their names were properly endorsed on the indictment. An examination of the briefs in that case, on file with this Court, will demonstrate that the suggestion that another witness "might" have appeared before the Grand Jury was a pipe-dream indulged in by appellant's counsel in a moment of desperation. The Court so noted, saying, "Appellant did not prove or attempt to prove, nor does the record show, that any witnesses other than those whose names were endorsed on the indictment appeared before the Grand Jury for the purpose of procuring the indictment; . . ." (p. 160, fn. 3).

Therefore, the entire remark of the Court in the *Soper* case concerning the endorsement of names on the indictment, was the purest of dictum, undiluted by any association with the facts of the case. Wholly unnecessary, it was further unfortunate in that it was not based on any real study of the problem; at least none of the briefs in the case attempted to discuss any authority whatever.

The *Soper* dictum should not be allowed to haunt us longer. It should be laid to rest, one way or the other. It should not be avoided and left hanging in air, as the Court does in this opinion.

II. THE COURT OVERLOOKS THE FACT THAT THE DEFENDANT HERE MADE A TIMELY MOTION TO DISMISS THIS INDICTMENT.

Said the Court:

“However, we need not reach this question. Appellant has failed to show that this claimed error has been in any way prejudicial to him.”
(p. 4)

Defendant made a motion to dismiss this indictment, because of the failure to endorse the names of the witnesses thereon, as soon as the indictment was returned. The motion was proper and timely made; it was, none the less, denied.

The statute requiring the names of witnesses to be endorsed on the indictment is a substantial right of the defendant; it is a *mandatory condition precedent to prosecution*; it is not, by any stretch of the imagination, a mere “matter of form”.

The cases cited by the Court at this point are completely inapposite: In *Hagner v. U. S.* (1932), 285 U.S. 427, the indictment in question was “loosely and inartificially drawn”; there was no question of ignoring a mandatory procedural requirement. There was no timely objection in any event, as the defendant did not question the indictment until after his trial and conviction. Even so, said the Court:

“The indictment in the particular complained of is loosely and inartificially drawn and not to be commended, but upon the record before us, *and without deciding that the indictment would not have been open to some form of challenge at an earlier stage of the case*, we are of the opinion

that after verdict it is not vulnerable to the attack here made upon it.” (433, emphasis sup.)

So, too, with *Hopper v. U. S.* (C.C.A. 9th, 1943), 142 F. 2d 181, and *Fisher v. U. S.* (C.A. 9th, 1956), 231 F. 2d 99. Both of these cases were concerned with the sufficiency as to form of the charging parts of the indictments. Neither concerned a situation, such as we have in the instant case, where there was a failure to perform a mandatory procedural step.

A. This is a mandatory statute.

Statutes may be classified, where appropriate, as either directory (permissive, advisory), or mandatory. Whether a law is directory or mandatory is usually determined by reference to its language, always with the design of effectuating the expressed legislative intent.

Sutherland says:

“The important distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while the failure to comply with the requirements of the latter either invalidates purported transactions or subjects the noncomplier to affirmative legal liabilities.

This distinction grows out of the fundamental differences in the intention of the legislature in enacting the two statutes. Although directory provisions are not intended by the legislature to be disregarded, yet the seriousness of noncompliance is not considered so great that liability automatically attaches for failure to comply. The

question of compliance remains for judicial determination. If the legislature considers the provisions sufficiently important that exact compliance is required then the provision is mandatory.”

Sutherland, Statutory Construction (3rd) Sec. 2801.

We wish the Court would examine the statute in question here through the same eyes with which it examined the statutory provisions in *Triangle Candy Co. v. U. S.* (C.C.A. 9th, 1944), 144 F. 2d 193. In the *Triangle* case the defendant had been convicted of violations of the Federal Food, Drug, and Cosmetic Act. However, the so-called “sample provision” requirement of the act had not been observed. That provision of the law stated as follows:

“(b) Where a sample of a food, . . . is collected for analysis . . . the Administrator shall, upon request, provide a part of such official sample for . . . analysis by any person . . .”.

Was this requirement a “mandatory prerequisite”, or merely directory? Said this Court:

“The statute, saying as it does that samples, with exceptions, *shall* be provided, is in terms mandatory. . . . The problem is always whether construing the statute as providing merely administrative direction would impair the interest, public or private, intended to be protected. . . . If those accused under the Act are not given a portion of the sample, their power to make a complete defense is substantially curtailed.” (198-9)

Convictions under the counts so affected, were reversed.

And note the language of Justice Cardozo in *Escoe v. Zerbst* (1935), 295 U.S. 490, where the Supreme Court was considering the interpretation of a statute relative to the revocation of criminal sentences. The act, after providing for arrest of the probationer, went on: "Thereupon such probationer shall forthwith be taken before the Court." Defendant had been so arrested, but was taken directly to prison, and not before the Court. The Supreme Court found the statute clearly mandatory, both from the language of "command", and upon consideration of the aims of Congress in enacting it.

"If these are the ends to be promoted by bringing the probationer into the presence of his judge, the Act is seen at once to be mandatory in meaning as well as mandatory in form. Statutes are not directory when to put them in that category would result in serious impairment of the public or private interests that they were intended to protect. . . . Such is the situation here." (p. 494)

What are the "public or private interests" afforded protection by a statute requiring the endorsement of witnesses on an indictment? In *State v. Stevens*, (S.D. 1891), 47 N.W. 546 (interpreting an identical statute) the Court said:

"It must be presumed that this requirement was made for some just and wise purpose. No doubt the object was for the benefit of the accused; to give him the opportunity of knowing who were his accusers, and by whom the state expected to establish the charge preferred, in order that he might be the better prepared to meet it. To pro-

tect the innocent, and punish the guilty, are the two great objects to be kept in view in the administration of criminal jurisprudence. . . . A person indicted would be put to great disadvantage and hazard when called upon to answer if he were ready for trial, if he was in ignorance of the information as required by this statute. On the other hand, it is for the benefit of the state that the requirement of this statute should be enforced. . . . The statute is a command, coupled with a penalty.” (pp. 546-7)

Admittedly, the decisions of the various state supreme Courts on this issue are in no way binding on this Court. But surely the decisions of such Courts, interpreting identical statutes, should be somewhat influential. These state Courts have, uniformly, held these identical statutes to be mandatory and binding according to their terms; they have *not* required, where timely objection has been made, any showing of “Prejudice” in order for the defendant to be entitled to the protection of the law. See, for example, *Cook v. State* (Okla. 1911), 120 Pac. 1038; *People v. Price* (Mich. 1889), 41 N.W. 853; *Andrews v. People* (Ill. 1886), 7 N.E. 265; *State v. Stevens*, *supra*; *Merris v. Commonwealth* (Ky. 1941), 151 S.W. 2d 1030; *State v. Rickmire* (Minn. 1919), 174 N.W. 529; *State v. Andrew* (Ore., 1899), 58 Pac. 786; *State v. Porter* (Mont. 1950), 220 P. 2d 1035.

The opinion of the Montana Supreme Court in *State v. Porter*, *supra*, contains an excellent historical analysis of the development of these witness statutes, and a fine summary of the aims of their promotion:

(1) that "secret inquisitions" be discouraged; (2) to protect the State against the cost of frivolous or malicious prosecutions; (3) to enable the person accused to know the witnesses against him; (4) to effectuate the constitutional safeguards entitling the accused to be confronted with his accusers; and (5) to avoid surprise. Said the Montana Court:

"Concealing the identity of witnesses whose names are required to be revealed to the accused is a return to medievalism and completely foreign to our modern enlightened concepts of justice. . . . The very fact that the witnesses appeared either voluntarily or by subpoena and were present before the Grand Jury indicates that their names were known. In such circumstances it is inexcusable for the state to conceal these witnesses from the accused. The statute requires that their names be endorsed. The history of criminal procedure demonstrates the sound reasons why the accused is entitled to this information. *It is a fundamental right of the accused and depriving him of that right is depriving him of a fair trial.*" (p. 1050)

We submit that these Alaska statutes are mandatory beyond question of a doubt; not only has the legislature said that the names of all witnesses before the Grand Jury "must" be endorsed or inserted (Sec. 66-8-52, A.C.L.A. 1949), but it has declared that in the event of a failure to so endorse or insert, then the indictment "must" be dismissed (Sec. 66-11-1, A.C.L.A. 1949). This is the language of command, and the public and private interests to be promoted are vital.

Consider, if you will, one very pertinent analogy. Section 3422, U.S.C., reads as follows:

“A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.”

Would this Court say that the requirements of *this* statute relative to the names of witnesses are mere “matters of form” constituting only “harmless error” in the absence of a showing of “prejudice”? If so, this Court would be flying directly in the face of the Supreme Court of the United States, which has held otherwise. See *Logan v. U. S.* (1892), 144 U.S. 263. In the *Logan* case, the Court said:

“The words of the existing statute are too plain to be misunderstood. The defendant, if indicted for treason, is to have delivered to him three days before the trial a copy of the indictment, and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment; . . . The list of witnesses to be required to be handed to the defendant is not a list of the witnesses on whose testimony the indictment has been found, or whose names are endorsed on the indictment; but it is a list of ‘witnesses to be produced on the trial for proving the indictment’. *The provision is not directory only, but mandatory to the government*; and its purpose is to inform the defendant of the testimony which he will have to meet, and to enable him to prepare a defense. Being

enacted for his benefit, he may doubtless waive it, if he pleases; but he has a right to insist upon it, and if he seasonably does so, the trial cannot lawfully proceed until the requirement has been complied with." (p. 304, emp. sup.)

Aside from the fact that the Alaska statutes are even more "mandatory", if that be possible, what is the difference? How can one statute be permissive, and the other mandatory? The answer is that both are mandatory and should be so treated by this Court.

B. The Court erred in requiring a showing of "prejudice".

Said the Court:

"Without some showing of prejudice, we hold that appellant's objection is only a matter of form." (p. 4)

We have already shown that the statute is mandatory, and therefore no showing of prejudice is lawfully required; a violation of the law imputes prejudice per se. But, further, to require the defendant to show "prejudice" before an indictment will be dismissed for failure to endorse the names of the witnesses, places an unreasonable and impossible burden upon him, and violates the important policy considerations upon which such statutes are based.

First, one of the reasons for such a requirement is to enable the defendant to show that the indictment was obtained upon improper evidence, or no evidence. For example, an indictment might be based only upon testimony of a police officer, not present at the crime and informed concerning it only by interviews with

actual witnesses. Such an indictment, based solely upon hearsay, would be void. But if the prosecuting attorney is allowed to ignore the statute and return an indictment barren of witnesses, there is no possible way for the defendant to establish that the indictment was unlawfully found.

Second, according to the *Porter* case, *supra*, such statutes are intended to discourage secret inquisitions (at common law, the witnesses before the Grand Jury were first sworn in open Court), and to protect the state against frivolous or malicious prosecutions. If we permit secrecy concerning the witnesses to be maintained, in spite of the mandate of the law, these policy considerations are out the window, and *carte blanche* is extended to the slanderer and the personal enemy.

Third, one of the most vital purposes of these laws, according to the authorities, is to enable the defendant to prepare to meet the testimony of particular witnesses, to investigate the background and antecedents of such witnesses, and to obtain material for impeachment, if any such material be available; to avoid injustice arising from surprise. Of course, if the law can be violated with impunity, and no witnesses need be shown, no such preparation is possible. What would it avail the defendant to run around investigating the witnesses *after* the trial is over? Suppose the defendant did discover material for possible impeachment, such as prior conviction of crime, or a prior contradictory statement, in the course of such a post mortem investigation? How would he bring this "possibly impeaching" material before the Appellate

Court? By *ex parte* affidavit? No, this would indeed be "love's labours lost".

Take the instant case for an example. The defendant had no way of knowing that the witness T. Henry Miller was to testify (r. 167-183). Therefore, the defendant was not fully prepared to present the impeaching material contained in his offer of proof (r. 177), nor to present legal authority in support of his position on the offer.

Even more apparent, the defendant could not possibly have anticipated the testimony of the witness O'Brien (r. 284-291), and therefore left the witness without cross-examination and without any attempt at impeachment. While the witness did not give testimony which seemed at the time particularly relevant, no one can say what his apparent corroboration of some portions of the witness Smith's testimony may have had on the jury. We believe that some effective cross-examination of O'Brien could have been undertaken if we had known he was to be a witness. As it was, we had to drop him, with unknown effect on the jury.

The plain fact is, that the view of this Court that the statute is only available to a defendant when prejudice can be shown means the complete destruction of the statute. Law enforcement officials are not going to follow it unless they have to. It has been rendered completely nugatory, meaningless and void; it no longer has any real existence, any more than if it had been, in fact, repealed.

This is to be regretted, as it tends to preserve the old idea of a criminal trial as a battle of wits and a sporting contest. You have wiped off the books one of the few forward looking steps in criminal procedure in Alaska.

The correct solution of the question concerning the validity of this statute is so important that this Court should grant rehearing on this issue.

Dated, Anchorage, Alaska,
October 19, 1959.

Respectfully submitted,

WENDELL P. KAY,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

Dated, Anchorage, Alaska,
October 19, 1959.

WENDELL P. KAY,
*Attorney for Appellant
and Petitioner.*

No. 15960 ✓

United States
Court of Appeals
for the Ninth Circuit

LIN FU MEI,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration
and Naturalization Service, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 30, inclusive)

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

FEB 11 1959

PAUL P. O'BRIEN, CLERK



No. 15960

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Northern
District of California, Southern Division

No. 36403-Civil

LIN FU MEI, Plaintiff,
vs.

BRUCE G. BARBER, as District Director of Im-
migration and Naturalization Service, San
Francisco, and DAVID H. CARNAHAN, as
Regional Commissioner of the Immigration and
Naturalization Service, Defendants.

EXCERPT FROM DOCKET ENTRIES

1957

Apr. 30—Filed Complaint—Issued Summons.

May 1—Filed affidavit of Arlin W. Hargreaves for
temp. restr. order.

1—9:30 AM Filed temp. restr. order vs. deft.
from taking into custody or proceeding
with deportation of plaintiff. (Murphy)

1—Filed motion of plaintiff for preliminary
injunction.

1—Filed order to show cause, returnable May
2, 1957 re prelim. inj. (Murphy)

* * * * *

2—Ordered memos. filed in 5 days and case
cont'd. to May 8, 1957 for submission.
(Murphy)

2—Filed answer of defendant.

2—Filed notice by plaintiff and motion for
summary judgment, May 6, 1957.

1957

May 6—Ordered case consolidated with 36393-Civil and continued to May 8, 1957 for submission. (Murphy)

8—Ordered case submitted. (Murphy)

* * * * *

Nov. 12—Filed opinion of Court (relief prayed by plaintiff denied. Findings of Fact and Conclusions of Law to be prepared by prevailing party.) (See 36393-Civil) (Murphy)

* * * * *

Nov 29—Filed proposed modifications by plaintiff to findings & conclusions.

1958

Jan. 16—Filed findings & conclusions. (Murphy)

16—Entered judgment—filed Jan. 16, 1958—denying declaratory judgment and dismissing complaint, and deft. to recover costs. (Murphy)

16—Mailed notices.

Feb. 12—Filed notice of appeal by plaintiff.

12—Filed appeal bond in sum \$250.00 (cash)

13—Mailed notices.

Mar. 4—Filed appellant's designation of record on appeal.

4—Filed statement of points upon which appellant intends to rely on appeal.

4—Filed reporter's transcript of hearing on modification of findings, Jan. 16, 1958.

[Title of District Court and Cause.]

COMPLAINT

Action For Declaratory Judgment

Comes now the plaintiff, Lin Fu Mei, and for cause of action alleges as follows:

I.

That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for a review under the Administrative Procedures Act (5 USC 1001) et. seq.);

II.

That the defendant, Bruce G. Barber, is the District Director of the Immigration and Naturalization Service, San Francisco District, San Francisco, California;

III.

That the defendant, Bruce G. Barber, as District Director of the San Francisco District, is charged with the duty to approve or disapprove the recommendation of the immigration officer upon an application made under the Refugee Relief Act of 1953.

IV.

That the defendant, David H. Carnahan, is the Regional Commissioner of the Southwest Region of the United States Immigration and Naturalization Service and that said Region includes the San Francisco District of the Immigration and Naturalization Service.

V.

That the defendant, David H. Carnahan, is

charged with the duty to make a final determination on all decisions and recommendations forwarded to him by the defendant, Bruce G. Barber, pursuant to applications filed within the District under the provisions of Section 6 of the Refugee Relief Act of 1953.

VI.

That the plaintiff filed an application for adjustment of his immigration status to that of a permanent resident pursuant to Section 6 of the Refugee Relief Act of 1953 with the defendant, Bruce G. Barber, District Director of the Immigration and Naturalization Service, San Francisco, California.

VII.

That the plaintiff was accorded an informal interview on his application for adjustment of status to that of a permanent resident; that by order dated December 22, 1955, the Immigration Officer at San Francisco, California, an agent and employee of the defendant, Bruce G. Barber, denied the plaintiff's application on the alleged ground that the plaintiff is of a class of alien which Congress did not intend to come within the purview of the Act; that by order dated February 1, 1956, the decision of the Immigration officer was approved by the defendant, David H. Carnahan, Regional Commissioner of the Immigration and Naturalization Service.

VIII.

That on July 17, 1956, plaintiff filed an Action for Declaratory Judgment in this Court; that on Sep-

tember 28, 1956, the Honorable Judge Louis E. Goodman ordered that plaintiff's Motion for Summary Judgment be granted and that the case be remanded to the Immigration and Naturalization Service for further proceedings.

IX.

That on February 12, 1957, a further hearing was conducted by the Immigration and Naturalization Service and that under date of March 18, 1957 the Examining Immigration Officer at San Francisco, California, an agent and employee of the defendant, Bruce G. Barber, denied the plaintiff's application on the alleged ground that plaintiff's place of last residence was Formosa and that he can return thereto without fear of persecution on account of his political opinion. That by order dated April 19, 1957 the decision of the Examining Immigration Officer was approved by the defendant, David H. Carnahan, Regional Commissioner of the Immigration and Naturalization Service; that a copy of said order is attached hereto, marked Exhibit "A", and made a part of this Complaint.

X.

That during the preceding Court action before the Honorable Judge Louis E. Goodman, the defendant did not contest and thereby conceded that plaintiff's last residence was the Mainland of China; that defendants' pleadings, admissions and lack of contest of said issue in the prior proceedings, both as to the plaintiff herein and to the consolidated case of

Cheng Fu Sheng vs. Barber, Civil No. 35662, is binding upon him at this time.

XI.

That the plaintiff's place of last residence is, in fact, the Mainland of China; that plaintiff would be persecuted for his political beliefs if he were forced to return to either Formosa or the Mainland of China; that the decision of the defendant, marked Exhibit "A", is further erroneous as a matter of law inasmuch as said defendant has improperly construed the meaning of the term "residence" as used in Section 6 of the Refugee Relief Act of 1953 and further that defendants' finding that plaintiff would not be persecuted upon return to Formosa is unsupported and, in fact, contrary to the evidence of record.

XII.

That the decision of the defendant, David H. Carnahan, is a final order from which the plaintiff has no administrative appeal; that plaintiff has exhausted all administrative remedies prior to filing this Complaint;

XIII.

That plaintiff lawfully entered the United States as a bona fide non-immigrant prior to July 1, 1953; that plaintiff is unable to return to the country of his birth, nationality or last residence because of persecution or fear of persecution on account of political opinion; that plaintiff is and at all times has been a person of good moral character; that plaintiff is otherwise qualified for admission to the

United States under all provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed.

XIV.

That plaintiff is statutorily eligible for adjustment of his immigration status to that of a permanent resident pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953 as amended.

Wherefore, plaintiff requests a judgment declaring:

1. That plaintiff's application for adjustment of status to that of a permanent resident pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953 may not be denied by the defendants.

2. That plaintiff's application for adjustment of status pursuant to Section 6 of the Refugee Relief Act of 1953 be returned to the defendants for approval and for submission to Congress.

3. For such other and further relief as is deemed by the Court to be proper.

Dated: April 30, 1957.

FALLON AND HARGREAVES,

/s/ By ARLIN W. HARGREAVES,
Attorneys for Plaintiff.

EXHIBIT "A"

United States Department of Justice
Immigration and Naturalization Service

File: A8 922 627—San Francisco Serial No. 697.

March 18, 1957

In re: Lin, Fu-Mei.

Proceedings under Section 6 of the Refugee Relief Act of 1953.

In Behalf of Applicant: Fallon and Hargreaves, Attorneys at Law, 550 Montgomery Street, San Francisco 11, California.

Application: Adjustment of Immigration Status.

The applicant is a 32-year old single male, a native and citizen of China. He last entered the United States at the port of Honolulu, T. H. on February 12, 1953, at which time he was admitted as a foreign government official, under the provisions of Section 101(a)(15)(A) of the Immigration and Nationality Act. The applicant testified that he was unable to return to the country of his birth because of fear of persecution, that country being communist dominated. He does not like to go back to Formosa because he thinks they will kill him because he is opposed to the Chiang Kai Shek Government. The applicant came to the United States as a member of the Chinese Nationalist Air Force to receive training under the mutual defense assistance program. After his training was completed, he deserted the Chinese Nationalist Air Force and has refused to return to Formosa. (Taiwan)

On December 22, 1955 it was recommended that the application be denied for the reason that the applicant was of the class of aliens which Congress did not intend to come within the purview of the Act. On February 1, 1956 the application was denied on this ground by the Regional Commissioner. The applicant filed an application to withhold deportation to Formosa which was subsequently denied by the Regional Commissioner on July 6, 1956. Thereafter this case was taken into the United States District Court, Northern District of California, San Francisco, California by the attorneys of record. On September 28, 1956, Judge Louis E. Goodman denied the defendant's motion to dismiss and granted the plaintiff's motion for a summary judgment. The order of the Regional Commissioner denying the application for adjustment of status under the Refugee Relief Act of 1953 was vacated and the case was remanded for further proceedings.

On February 12, 1957 a further hearing was conducted at which time additional evidence was presented. The applicant and his attorneys contend that he deserted the Chinese Air Force in this country because of his opposition to the Nationalist Government of Chiang Kai Shek, and if he returned to Formosa he would be persecuted because of his political stand. Under date of January 8, 1957 the Chinese Consul General in San Francisco officially advised this Service that his Government had directed him to declare that according to their law this applicant is subject to prosecution for desertion upon his return to Taiwan. He will face a trial in

an orderly, judicial process, in which there will be a formal indictment and the defendant is permitted to be defended by lawyers, including the right to cross-examine witnesses against him. If convicted he will be subject to punishment according to Article 93 of the Criminal Code governing the personnel of the Army, Navy, and Air Force of the Republic of China, the maximum sentence being imprisonment for not more than 3 years. The allegation that he will be subject to persecution or death sentence is entirely groundless.

It is believed that members of the Armed Forces of China should be placed in the same category as other Government Officials holding official positions in Formosa (Taiwan). As the Chinese Nationalist Government has possession of Formosa and is there indefinitely, it is believed that the residence is in Formosa. It is therefore apparent that this applicant can return to Formosa (Taiwan), the place of his last residence, without fear of persecution on account of his political opinion, and the application will be denied on that ground.

Recommendation: It is recommended that the alien's application for adjustment of immigration status under the provisions of Section 6 of the Refugee Relief Act of 1953 be denied for the reason that the applicant can return to Formosa (Taiwan), the place of his last residence, without fear of persecution on account of his political opinion.

A. J. Borstadt,

ew

Immigration Officer

Upon consideration of the entire record, and the exceptions filed, we find that the exceptions are without merit and that the application should be denied.

/s/ DAVID H. CARNAHAN,
Regional Commissioner,
Southwest Region.

So Ordered. April 19, 1957.

[Endorsed]: Filed April 30, 1957.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendants Bruce G. Barber, as District Director of Immigration and Naturalization Service, San Francisco, and David H. Carnahan, as Regional Commissioner of the Immigration and Naturalization Service, and answers the action for declaratory judgment herein as follows:

I.

The allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and XII are admitted.

II.

The allegations of Paragraphs XI, XIII, XIV, are denied.

III.

With reference to the allegations of Paragraph X to the effect that the defendants did not contest and thereby conceded that plaintiff's last residence was the Mainland of China in the Court action before the Honorable Judge Louis E. Goodman, the defendants state that the question of the residence

of the plaintiff was not before the Honorable Judge Goodman. Instead the question was the issue as to whether or not the plaintiff was within a class to be considered within Section 6 of the Refugee Relief Act of 1953. Furthermore, that a prior administrative decision is not binding upon an administrative agency and upon the subsequent proceedings of the Immigration and Naturalization Service pursuant to the order of the Honorable Judge Louis F. Goodman, the question of residence was determined in accordance with the evidence considered.

Wherefore, the defendants pray that the relief prayed for by the plaintiff be denied and that the defendants have their costs of suit herein.

Dated: May 2, 1957.

LLOYD H. BURKE,
United States Attorney,
/s/ By JAMES W. GRANT,
Special Assistant U. S.
Attorney.

Notice of Mailing Attached.

[Endorsed]: Filed May 2, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To defendants above-named and Lloyd H. Burke, United States Attorney, and Charles Elmer Collett, Assistant United States Attorney, Post Office Building, San Francisco, California, his attorneys:

Please take notice that on Monday, May 6, 1957, at the hour of 9:30 o'clock A.M. or as soon thereafter as the matter can be heard in the Law and Motion Department, United States District Court, Post Office Building, Seventh and Mission Streets, San Francisco, California, the plaintiff will present a Motion for Summary Judgment. The copy of the Motion is attached hereto and made a part hereof.

Dated: May 2, 1957.

FALLON & HARGREAVES,
/s/ By ARLIN W. HARGREAVES,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The plaintiff, Lin Fu Mei, by and through his attorneys of record, hereby moves the court to enter Summary Judgment for the plaintiff in accordance with the provisions of Rule 56 of the Rules of Civil Procedure on the ground that the pleadings and Exhibits heretofore filed with this Court show that the plaintiff is entitled to judgment as a matter of law.

Dated: May 2, 1957.

FALLON & HARGREAVES,
/s/ By ARLIN W. HARGREAVES,
Attorneys for Plaintiff.

[Endorsed]: Filed May 2, 1957.

In The United States District Court, Northern
District of California, Southern Division

Nos. 36393 and 36403

CHENG FU SHENG and LIN FU MEI,
Plaintiffs,
vs.

BRUCE G. BARBER, as District Director of Im-
migration and Naturalization Service, San
Francisco, and DAVID H. CARNAHAN, as
Regional Commissioner of the Immigration and
Naturalization Service, Defendants.

OPINION

Murphy, District Judge.

Upon the well reasoned authority to be found in
Wei v. Robinson, a case decided by the United
States Court of Appeals, Seventh Circuit, June 28,
1957 (246 F. 2d 739) the relief sought by the peti-
tioners, and each of them, is hereby denied.

Let the prevailing party prepare findings of fact
and conclusions of law, which because of the nature
of the issues involved would seem eminently appro-
priate in this instance.

Dated: November 12th, 1957.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed November 12, 1957.

[Title of District Court and Cause.]

PROPOSED MODIFICATIONS OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

(No changes in first four paragraphs.)

V.

In an oral decision rendered March 2, 1956 plaintiff was found deportable from the United States on the charge set forth in the warrant of arrest. Plaintiff was granted voluntary departure with an alternate order of deportation to take effect in the event he failed to depart when and as required by the District Director.

VI.

On April 26, 1956 a warrant of deportation was issued.

Conclusions of Law

I.

Plaintiff is subject to deportation on the charge set forth in the warrant of arrest.

II.

The warrant of deportation issued by the defendant is valid.

(Change petitioner to plaintiff throughout.)

Reasons For Objections

Objection is taken to Findings of Fact V, VI, VII, VIII, IX and X and to Conclusions of Law II, III and V submitted by defendants. The ground of objection is that the above Findings and Con-

clusions pertain to plaintiff's eligibility for adjustment of status under Section 6 of the Refugee Relief Act of 1953. Although the issue of plaintiff's eligibility under Section 6 was presented herein, it appears that no determination of said issue was made in the opinion of this Court filed November 12, 1957.

Relief was denied to plaintiff upon the authority of *Wei v. Robinson*, 246 F 2d 739. That case reviewed a declaratory judgment of the trial court which had held an order of deportation to be invalid. The only issue presented and determined by the Court in *Wei v. Robinson* was whether an alien who is admitted prior to the effective date of the Immigration and Nationality Act of 1952 as a government official and subsequently fails to maintain that status is subject to deportation under the provisions of Section 241 (a) (9) of the Immigration and Nationality Act of 1952. That Court did not consider nor decide whether or not Wei was eligible for change in status under the provisions of the Refugee Relief Act of 1953. This Court's opinion then, based upon the decision in *Wei v. Robinson*, provides no basis for Findings of Fact or Conclusions of Law to be made concerning any other issue than that of deportability.

Dated: November 29, 1957.

Respectfully submitted.

FAILON & HARGREAVES,
/s/ By ARLIN W. HARGREAVES,
Attorneys for Plaintiff.

[Endorsed]: Filed November 29, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above action having come on for trial before the Honorable Edward P. Murphy, Judge of the above-entitled Court, on the 6th day of May, 1957, petitioner appearing by his attorneys, Fallon and Hargreaves, and defendants appearing by Lloyd H. Burke, United States Attorney, and James W. Grant, Special Assistant United States Attorney, and the Court being fully advised of the premises, makes the following findings of fact and conclusions of law.

Findings of Fact

I.

The petitioner last entered the United States from Taiwan (Formosa) at the Port of Honolulu, Territory of Hawaii, on February 12, 1953. He was admitted as an official of the Chinese Nationalist Government in the status of a bona fide non-immigrant under the provisions of Section 101(a)(15) (A) (ii) of the Immigration and Nationality Act of 1952, (66 Stat. 167; 8 USCA 1101).

II.

The petitioner at the time of entry was an officer in the Chinese Nationalist Air Force who had come to the United States under the Mutual Defense Assistance Program for advance pilot training at Tyndall Air Force Base, Florida, for the period of eleven weeks.

III.

During May 1953, the petitioner, having completed said advance pilot training, and while enroute to Taiwan (Formosa) with a Chinese Nationalist Air Force group, deserted said Air Force group in San Francisco, California, took employment in a civilian job, and remained in the United States.

IV.

On November 29, 1954, a warrant for the arrest of the petitioner as an alien illegally in the United States was issued by the Immigration and Naturalization Service charging "he was admitted as a non-immigrant and failed to comply with the conditions of the non-immigrant status in which he was admitted, to-wit, an accredited government official or employee, as described in Section 101 (a)(15)(A) (ii) of the Act."

V.

On December 23, 1954, the petitioner filed an Application under Section 6 of the Refugee Relief Act of 1953, and on February 1, 1956, after appropriate hearings, the application was denied by the Regional Commissioner.

VI.

On April 19, 1956, the petitioner applied for a stay of deportation under Section 243(h) of the Immigration and Nationality Act of 1952, and on May 16, 1956, after appropriate hearing, this application was denied.

VII.

On April 26, 1956, petitioner having been found

to be an alien illegally in the United States in that he had failed to maintain the status under which he was admitted, a warrant of deportation was issued.

VIII.

In an action for a declaratory judgment filed July 12, 1956, this Court on September 28, 1956, vacated the Order of the Regional Commissioner denying the application for adjustment of status and remanded the case to respondent for further proceedings to determine whether the petitioner was eligible for relief under Section 6 of the Refugee Relief Act.

IX.

On April 19, 1957, after further hearings, the Regional Commissioner denied the plaintiff's application under Section 6 of the Refugee Relief Act on the grounds that the petitioner did not come within the provisions thereof since he is not unable to return to Taiwan (Formosa), the place of his last residence, because of persecution or fear of persecution on account of race, religion or political opinion.

X.

The petitioner's place of last residence is Taiwan (Formosa), and the petitioner is able to return to Taiwan (Formosa) without persecution or fear of persecution on account of his race, religion or political opinion.

Conclusions of Law

I.

The petitioner's status as a non-immigrant entitled to remain in the United States terminated

when he deserted his Air Force group and took work other than specified in the terms of his admission.

II.

Upon the termination of his status as a bona fide non-immigrant within the meaning of Section 6 of the Refugee Relief Act, petitioner became ineligible for consideration for the benefits of that act.

III.

The petitioner is not eligible for consideration under Section 6 of the Refugee Relief Act since he can return to his place of last residence, Taiwan (Formosa) without persecution or fear of persecution on account of race, religion or political opinion.

IV.

Petitioner has at all times been afforded due process and a fair hearing, and there has been no abuse of administrative discretion.

V.

The petitioner is not entitled to the declaratory judgment which he seeks by this action.

VI.

The warrant of deportation issued by the defendant is valid.

Let Judgment be entered accordingly.

Dated: January 16th, 1958.

/s/ EDWARD P. MURPHY,

United States District Judge.

Notice of Mailing Attached.

[Endorsed]: Filed January 16, 1958.

In The United States District Court, Northern
District of California, Southern Division

Civil No. 36403

LIN FU MEI,

Plaintiff,

vs.

BRUCE G. BARBER, as District Director of Im-
migration and Naturalization Service, San
Francisco, and DAVID H. CARNAHAN, as
Regional Commissioner of the Immigration and
Naturalization Service, Defendants.

JUDGMENT

The above cause came on regularly for trial be-
fore the Court upon the complaint for declaratory
judgment, and the answer of the defendants.

The plaintiff having moved for a summary judg-
ment, and the matter having been duly submitted,
the Court, after reviewing the administrative rec-
ord, having on November 12, 1957, made and en-
tered its order denying the relief sought by the
petitioner, and having thereafter on January 16,
1958, made and filed its findings of fact and con-
clusions of law;

It Is Hereby Ordered, Adjudged and Decreed
that the plaintiff's prayer for declaratory judgment
be denied; that the complaint and action be dis-
missed and that the defendants have judgment of
their costs.

Dated: January 16, 1958.

/s/ EDWARD P. MURPHY,
United States District Judge.

Entered in Civil Docket Jan. 16, 1958.

[Endorsed]: Filed January 16, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

You are hereby notified that the plaintiff, Lin Fu Mei, appeals to the United States Court of Appeals for the Ninth Circuit, from the Final Judgment entered in the above action on January 16, 1958.

Dated: February 11, 1958.

FALLON & HARGREAVES,
/s/ By ARLIN W. HARGREAVES,
Attorneys for Appellant.

[Endorsed]. Filed February 12, 1958.

[Title of District Court and Cause.]

CASH DEPOSIT IN LIEU OF BOND FOR COSTS ON APPEAL

The undersigned acknowledges that he and his personal representatives are bound to pay to defendant, the sum of Two Hundred Fifty (\$250.00) Dollars, and he hereby deposits in cash the sum of Two Hundred Fifty (\$250.00) Dollars into the

registry of this Court in lieu of a bond for costs on appeal.

The condition upon which said deposit is made is that, whereas the plaintiff has appealed to the Court of Appeals for the Ninth Circuit by Notice of Appeal filed February 12, 1958, from the Judgment of this Court entered January 16, 1958, if the plaintiff shall pay all costs adjudged against him if the appeal is dismissed or the Judgment affirmed, or such costs as the Appellate Court may award if the Judgment is modified, then said deposit shall be returned to the undersigned, but if the plaintiff fails to perform this condition, delivery of said deposit to the defendant shall be made forthwith.

/s/ LIN FU MEI,
Plaintiff.

Signed and acknowledged before me this 12th day of February, 1958.

[Seal] /s/ JOSEPH P. FALLON, JR.,
Notary Public, in and for the City and County of
San Francisco, State of California.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 20, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which Appellant will rely on appeal are:

1. The Court erred in finding that the Plaintiff-

Appellant's place of last residence is Taiwan (Formosa).

2. The Court erred in finding that the Plaintiff-Appellant is able to return to Taiwan (Formosa) without persecution or fear of persecution on account of his race, religion or political opinion.

3. The Court erred in concluding that the Plaintiff-Appellant became ineligible for the benefits of Section 6 of the Refugee Relief Act upon termination of his status as a bona fide non-immigrant in the United States.

Dated: March 3, 1958.

FALLON AND HARGREAVES,
/s/ By ROBERT S. BIXBY,
Attorneys for Plaintiff-
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 4, 1958.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the plaintiff-appellant hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit, taken by Notice of Appeal filed February 12, 1958, the following portions of the record, proceedings and evidence in this action:

1. Complaint with attachment.
2. Answer.
3. Certified copy of the record of the Immigration and Naturalization Service.
4. Plaintiff's Motion for Summary Judgment.
5. Opinion dated November 12, 1957.
6. Proposed Modifications of Findings of Fact and Conclusions of Law.
7. Reporter's transcript of hearing on Modifications of Findings.
8. Findings of Fact and Conclusions of Law dated January 16, 1958.
9. Judgment dated January 16, 1958.
10. Notice of Appeal.
11. Statement of Points on Appeal.
12. This Designation.
13. Docket Entries.

Dated: March 3, 1958.

FALLON AND HARGREAVES,
/s/ By ROBERT S. BIXBY,
Attorneys for Plaintiff-
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 4, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Complaint (Action for Declaratory Judgment).

Answer.

Notice and Motion of Plaintiff for Summary Judgment.

Opinion of Court.

Proposed Modifications of Findings of Fact and Conclusions of Law by Plaintiff.

Findings of Fact and Conclusions of Law.
Judgment.

Notice of Appeal.

Appeal Bond.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

Appellant's Designation of Record on Appeal.

Defendant's Exhibit 1 (Certified copy of record of Immigration and Naturalization Service).

Reporter's Transcript of Proceedings of Jan. 16, 1958.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 24th day of March, 1958.

[Seal]

C. W. CALBREATH,

Clerk,

/s/ By MARGARET P. BLAIR,

Deputy Clerk.

[Endorsed]: No. 15960. United States Court of Appeals for the Ninth Circuit. Lin Fu Mei, Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 24, 1958.

Docketed: April 2, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 15959

CHENG FU SHENG, Petitioner-Appellant,

vs.

BRUCE G. BARBER, as District Director of
Immigration and Naturalization Service, San
Francisco, Respondent-Appellee.

No. 15960

LIN FU MEI, Appellant,

vs.

BRUCE G. BARBER, as District Director of
Immigration and Naturalization Service, San
Francisco, and

DAVID H. CARNAHAN, as Regional Commis-
sioner of the Immigration and Naturalization
Service, Appellees.

ORDER

Considering the Motion of Appellants for an order to consolidate the above entitled and numbered cases for the purpose of briefing, argument and submission it is this 22nd day of April, 1958,

Ordered that the above entitled cases be consolidated for the purpose of briefing, argument and submission.

/s/ ALBERT LEE STEPHENS,
Chief United States Circuit
Judge.

[Endorsed]: Filed April 22, 1958. Paul P.
O'Brien, Clerk.

Nos. 15959, 15960

United States
Court of Appeals

for the Ninth Circuit

CHENG FU SHENG and LIN FU MEI,
Appellants,
vs.

BRUCE G. BARBER, District Director, Immigra-
tion and Naturalization Service, Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 33-49, inclusive)

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

FEB 11 1959

PAUL P. O'BRIEN, CLERK

Nos. 15959, 15960

United States
Court of Appeals
for the Ninth Circuit

CHENG FU SHENG and LIN FU MEI,
Appellants,
vs.

BRUCE G. BARBER, District Director, Immigra-
tion and Naturalization Service, Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 33-49, inclusive)

Appeal from the United States District Court for the
Northern District of California,
Southern Division

In the District Court of the United States, North-
ern District of California, Southern Division

No. 36,393

CHENG FU SHENG, Plaintiff,

vs.

BRUCE G. BARBER, Defendant.

No. 36,403

LIN FU MEI, Plaintiff,

vs.

BRUCE G. BARBER, Defendant.

REPORTER'S TRANSCRIPT

Thursday, January 16, 1958

Before: Hon. Edward P. Murphy, Judge.

Appearances: For the Plaintiffs: Arlin W. Hargreaves, Esq. For the Defendant: Hon. Lloyd H. Burke, United States Attorney, by James W. Grant, Esq., Assistant U. S. Attorney. [1]*

Mr. Grant: Your Honor, in our proposed findings of fact which we have lodged it was our object to include what we believe you intended. We believe you intended to dispose of the issues which were raised in the petition, and to make findings which were in accordance with the conclusion that relief was denied, and therefore the petitioners' statements were to be refuted.

* Page numbers appearing a top of page of Reporter's Transcript of Record.

We feel that there are two pertinent findings in here that have been objected to — or one that has been objected to. But the entire point of the petitioner would be that, I believe, the Wei case has only the conclusion that the petitioner was deportable. We feel that if the Wei case is applicable to this situation we must go one step further and find that since he was deportable, since his status had changed between the time that he had arrived lawfully and the time that he made his petition, then he is no longer eligible for consideration under Section 6.

The Court: Referring to the Refugee Act, Section 6?

Mr. Grant: Yes, sir, the Refugee Relief Act.

The Court: For your benefit, Mr. Hargreaves, so when your turn comes to argue your position, I intended by the blanket order which I issued to cover that, because I said in the order I found upon review of all the administrative proceedings which had been held, if they may be called such, [2] before the Immigration and Naturalization Service, that there was no evidence, in my opinion, that the Board had acted either capriciously or arbitrarily, and I intended by that language to cover the Refugee Act. I saw no reason to particularize it.

The Board of Immigration Appeals found that these petitioners were entitled to no relief under the Refugee Act, Section 6, and I upheld that by, in effect, stating that I found no evidence that there had been any unwarranted abuse of the power and

the discretion or misuse of the evidence, and therefore I upheld the Immigration Service in that respect. And I think these findings make that obvious, and I think that was your purpose.

Mr. Grant: That was our purpose, to cover all the possible discrepancies between the findings that he was afforded due process and the allegations of the petition that he had not been. That is, very precisely, your Honor, our position.

The Court: I will hear from you, Mr. Hargreaves.

Mr. Hargreaves: It is our position, your Honor, as Mr. Grant has stated, that from your Honor's opinion we feel that the only way the Court could properly uphold—I do not want to say “uphold”—but not be inconsistent with the opinion filed, would be to adopt the government's finding that because the parties are deportable—I mean, there is [3] no question about that. We concede that they are deportable. It was never even contested before the Immigration Service. Because they are deportable, then, they are not eligible for relief under Section 6 of the Refugee Relief Act. Actually, that is the only finding in the Wei case, was that he was deportable.

I must admit that I was very surprised in reading the Wei case, because it was my understanding that it had been brought on the question of physical persecution in Formosa as disclosed by comments of the Court in the District Court.

The Court: I was surprised, too. But when you read the opinion it does not bear that out.

Mr. Hargreaves: No, it does not, your Honor, and apparently it was submitted solely on the question of deportability. The fact is Mr. Grant obtained the copy of the complaint, which he was kind enough to let me read, and there was nothing in there about physical persecution or the Refugee Relief Act. It merely goes on the question of deportability. Of course, it is similar to Cheng and Lin in that they all came to the United States for military training. They left their unit and they remained here illegally.

We are not contesting deportability in the case of Cheng or Lin. That has at all times been conceded. The question which we attempted to bring before the Court was whether or not they were eligible for adjustment under Section [4] 6, and we do not feel that the question of deportability is relevant to Section 6, because we merely needed to show that they were lawfully admitted.

In running our cases in the office last night briefly, we had 47 cases granted by the Immigration Service, and out of those 47 I can only find four cases that were not deportable at the time the application was filed. All the rest of them were in deportable status.

I feel that this question of deportability is the whole crux of our objection to the proposed findings.

The Court: As I indicated earlier in response to Mr. Grant's statements, I intended that my order embrace the issue of relief under the Refugee Act. In my judgment they are not entitled to it, and I

held that the action taken by the Immigration people—I have great sympathy for these two boys; I can appreciate their position. I have sympathy for any alien who comes to this country because of oppression, because of restrictions on religion, because of oppression. People who come here come for a variety of other good and valid reasons. But I cannot escape the feeling, Mr. Hargreaves, that these people—I can't have sympathy for them in this respect, really taking advantage of this government. I do not know what their motives were when they first came here. I assume they have been screened in Formosa before being sent over here, and they were loyal adherents of the [5] Nationalist Government. But after coming here they surreptitiously avoided the normal channels for admission into this country, and then to expect this government to give them sanctuary is, to me, a rather incredible thing. I have no doubt that when they got here, after spending some time on the Island of Formosa, they preferred this government to that to which they had given their allegiance, but, after all, they did give their allegiance to it.

They came here under a plan of exchange, the ramifications of which I am not familiar with, whereby they came here as officials of the Chinese Nationalist Air Force to receive training in Florida, and then they decided they did not like Formosa any more, and so they jumped their ship, whatever they did here, and came here to work as bus boys. That, to me, is not the proper way of doing things. I just can't see it.

Mr. Hargreaves: As to the facts, your Honor, I believe it should be brought out in the case of Cheng, he attempted to resign his commission before he ever came to the United States. He also attempted to enlist in the United States Air Force before he came over here. After he came to the United States he attempted to resign because of his political opposition to Chiang. It was well known in the Air Force, his position, and when it came to the day he was leaving—we can hardly call it a desertion, because his commanding officers realized what awaited him in Formosa, and he had [6] the rest of the officers go into the barracks—he even called the taxi so Cheng could go up town, and helped him pack his baggage.

The Court: What did they do with him when he got back to Formosa.

Mr. Hargreaves: We don't know. Probably the government in Formosa never found out about it.

But they are very sincere in their opposition to the government, and it is not a question of coming over here and just trying to stay in the United States.

Congress has already taken cognizance in the General's case, who did likewise.

The Court: I am familiar with that; he was the one who came here for treatment, hospitalization.

Mr. Hargreaves: Yes. They approved his refugee petition and made him a permanent resident.

I might say, your Honor, Congress reviews these very carefully. In the 47 cases which we had, 12 of those were denied by Congress, and that is the rea-

son I feel that the language in the statute is so mandatory that they be sent to Congress, because Congress reviews them themselves. They have a regular committee set up that just does that, goes over the facts and decides whether these people are entitled to it.

As far as the statutory requirements go, they appear so clear that these people fit within the statute. I don't [7] know, I just feel that these cases should be sent to Congress and let Congress decide them.

The Court: What is the procedure for doing that?

Mr. Hargreaves: If the matter is referred back to Immigration with instructions, then it would go to the regional office and be sent to Congress for consideration.

The Court: What is your position on that, Mr. Grant?

Mr. Grant: I can only follow the instructions which have been set down and the regulations which have been provided under this section. And while Congress has set up this procedure whereby these people can be referred to Congress, they have set up the preliminary procedure that the Immigration Service must first find that they are eligible within the standards that Congress has set up in the Act, and we believe in this case——

The Court: Of course, Immigration has not found that.

Mr. Hargreaves: That is right. This last time they said that because they were connected with the

Air Force, then they have a quasi-official capacity, and residence is in Formosa; since the last residence was Formosa, then they would not come within the Act, though in their prior opinion they held that the last actual residence, as in general terms used, is in China, and they would come within the Act. So we have a [8] very narrow legal question as to the term of residence, and that is the only thing——

The Court: At least one of the wives of one of these petitioners is in Formosa, is she not?

Mr. Hargreaves: Yes, she is there also as a refugee. She has registered with the government as a refugee. She has registered with the American Consul as a refugee. She was taken out of Northern China ahead of the Communists and flown into Formosa.

The Court: What do you regard as their place of residence? Northern China?

Mr. Hargreaves: Northern China, your Honor. That is their own home. Formosa, as far as the wife is concerned, was merely a temporary sanctuary. She was flown out ahead of the Army. The two boys, themselves, were brought in under military orders from Northern China.

Judge Goodman, in his prior opinion, indicated that Congress—or he stated that Congress had reserved this unto themselves to decide these questions.

The Court: But only, as I understand it, after Immigration had decided that they came within the category.

Mr. Grant: Only if they meet the statutory re-

quirements. There is no discretion in immigration. This is not a discretionary statute.

The Court: I appreciate that, but here we are [9] faced with the situation all down the line where every relief sought by these petitioners has been denied, and it is up to me to find some loophole in that, and I have been unable to do it.

Mr. Hargreaves: In each case, on appeal, the matter has been reversed, and reversed, and reversed, until we come down to this last. The only thing that is stopping these cases from going to Congress now is the distinction between official residence and actual residence.

In your Honor's decision in the Sun case you brought out that this was a remedial statute and it should be construed liberally in favor of the alien.

The Court: Yes, I remember that.

Mr. Hargreaves: Certainly in placing such a restricted definition on the term "residence," which is not done in any other refugee case,—they are very liberal in residence on all other cases—but in these particular cases they have used this strict official term in trying to keep it from going to Congress. And I do not feel that these boys have had what you would call an unbiased or fair hearing from Immigration, because from the very start it has just been a battle to keep the case out of Congress.

Mr. Grant: I do not see how you can say that, Mr. Hargreaves. The evidence which was submitted is so voluminous, and in each case it seems to have received adequate [10] consideration.

The Court: It certainly is voluminous. In one

case much of it was irrelevant—newspaper articles, excerpts from Life Magazine, and things like that. But there was a great deal of evidence there.

I am very sympathetic, as I said before I would be, to these people, and I wish there were some way I could help them, if you could point out a way that I could get this to Congress. I am faced with a review of these proceedings before Immigration, and I cannot conscientiously say that there is any deprivation of any rights, or any arbitrary action on the part of Immigration. Faced with that I have to conclude as I have.

Mr. Hargreaves: I feel, your Honor, that this question of residence was actually decided by Judge Goodman. It was in the pleadings. It was answered. It was admitted there before the Court. I do not see how the government could turn around and reverse their findings on that issue. I feel it is *res judicata*, because the matter was pleaded before Judge Goodman.

The Court: Of course, it comes before me *de novo*, does it not?

Mr. Hargreaves: Yes, your Honor. It would not be *de novo*, your Honor, if they are bound by the prior court decision.

Mr. Grant: As I understand it, the effect of [11] Judge Goodman's order was to grant reconsideration, and thereafter there was the reconsideration.

The Court: That was my understanding. Judge Goodman—I don't recall the exact words he used in his opinion, although I have read it several times—

although he did discuss residence at some length, I regarded what he said with regard to residence as mere dicta, in view of the fact that he sent it back to Immigration for reconsideration.

Mr. Hargreaves: We still have the proposition, your Honor, that it was pleaded and conceded.

The Court: Regardless of that, he did not pass definitively upon that. He sent it back to Immigration for reconsideration, did he not?

Mr. Hargreaves: He sent it back—well, we have a very peculiar situation. Immigration denied it on the ground Congress did not intend for this type of person to apply for relief, and Judge Goodman said only Congress can say that, and, of course, Congress, since, by granting the General's case, has shown that they are not excluding persons who were in the Chinese military. And Judge Goodman sent it back and said they could not deny it on that ground.

Actually, it would be the quickest way, also. If this had gone to Congress a couple or three years ago this would have been all decided. But it has been a matter of constant legal technicalities. It is not the type of case where the [12] government has said, "Well, we will make a fair determination and send it up on the facts." But they have been searching and trying to find technicalities on which to deny it.

Mr. Grant: I think that is a conclusion.

The Court: Let me ask you this: To your knowledge have there been any other cases involving these trainees who have come to this country which might be akin to these cases?

Mr. Grant: The only one I know of, your Honor, is the Wei case, and I don't know what happened in the refugee proceeding.

The Court: There is another thing. I have been in a field, now, where I do not belong. I concede that. But presumably we have good diplomatic relations with the Chinese Nationalist Government.

Mr. Grant: That is true, your Honor.

The Court: That is evidenced by the fact that these boys were here initially. And anyone who wants may read and know that we have given considerable aid to Chiang Kai Shek on Formosa.

I would imagine—now, again, as I say, I am in a field in which I hesitate to enter, but Congress might be seriously embarrassed with a situation of this kind.

Mr. Hargreaves: If Congress is embarrassed by the situation, all they have to do is to do nothing, and then the [13] case is denied. If it sits through Congress and no affirmative action is taken, then it is automatically denied. So Congress should not be embarrassed.

The Court: I do not know whether it should be or not. I am just posing that question.

Mr. Hargreaves: Yes. I mean, it is not a case where it is going to come from Congress on argument, because if Congress approves—that is, if it goes through the committee and it is approved, it is put on a master list of names and granted by concurrent resolution. If Congress does not approve, or if the congressional committees do not approve of it, then it is simply left off the list, and at the end

of the congressional term it is automatically back in deportation status and they are faced with expulsion.

The Court: It just dies, in other words.

Mr. Hargreaves: That is right, your Honor.

The Court: Of course, you have your normal channels of appeal from this order.

Mr. Hargreaves: No, there is no appeal, your Honor. I mean, we have exhausted every administrative appeal.

The Court: Do you mean to say you can't go to the Circuit Court?

Mr. Hargreaves: Oh, yes, your Honor; I thought you meant administratively.

The Court: No, I mean an appeal from this order [14] and this judgment. You can go to the Circuit Court.

Mr. Hargreaves: Certainly, your Honor.

The Court: As much as I dislike to do it, because I do not think I could be more plain in indicating my sympathy to your cause, I am afraid you will have to go to the Circuit Court. This is one time I hope I may be reversed.

Mr. Hargreaves: Incidentally, your Honor, on this are you making a finding that they would not be subjected to physical persecution in Formosa?

The Court: No, I am not making any finding on that at all. I would be ruling in a vacuum if I did that. I have no means of knowing. We have some letters, which are not very persuasive, from the Chinese Consul, that they would be given a fair trial and possibly a three-year sentence.

Mr. Hargreaves: We are faced with one more problem, then, your Honor. If your Honor is not prepared to rule on that issue—of course, he does not need to establish actual persecution, but only fear of persecution, under the statute—I think there is no question about it; he certainly has fear of prosecution——

The Court: He has a reasonable fear of being prosecuted for desertion, even though it may be a technical desertion. He has to face trial.

Mr. Hargreaves: That is not the fear which he has. I mean because of the political—— [15]

The Court: What you mean to say is that he has a reasonable fear that he is going to be persecuted because of his political antipathy toward Chiang Kai Shek.

Mr. Hargreaves: That is correct, your Honor, and because of his actual actions against him. And, of course, if you uphold the government's finding that his last official residence was Formosa, then there is still the question, well, if he has established a reasonable fear of return to Formosa, he is still eligible for relief under the Refugee Relief Act.

Mr. Grant: Your Honor, I hope I did not mislead you. There is a conclusion in here that the petitioner is not eligible for consideration under Section 6, since he can return to his place of residence, Taiwan, Formosa, without fear of persecution on account of race——

The Court: Oh, yes, that is in there. I remember that. All I have that is tangible to go on is the letter of the Chinese Consul.

Mr. Hargreaves: In opposition to that there is, of course, not only the man's own testimony, but there is Wu, a former governor, and there is the former testimony of two former Army officers. There is a great deal of direct evidence in there as to the conditions that existed in Formosa, and it would not be a prosecution for the crime of desertion, but punishment or death because of his political opposition.

The Court: If I were to hold that he has a [16] reasonable fear of persecution because of his political beliefs, then I would have to hold that he is eligible for relief under the Refugee Act, and I cannot hold that. I simply cannot, in logic, in reason, hold that, in view of the evidence taken administratively which has been before me.

Mr. Hargreaves: If he has a reasonable fear, then he is eligible. At least it should be sent to Congress and let Congress decide it.

Mr. Grant: There must be a distinction between whether he has a fear and whether his fear is objectively valid. He may have that fear, but we have no concrete evidence.

The Court: As a man I can appreciate his apprehension about going back there, but, as Mr. Grant has pointed out, objectively I have no evidence upon which to predicate that. That is a complete answer. In fact, there is some evidence to the contrary. Frankly, as a man, I would not believe it.

Well, there is nothing I can do but sign the judgment that is submitted, and the findings.

And I hope, Mr. Hargreaves,—and I do sincerely

hope — you may be able to get some relief in the Court of Appeals.

Mr. Hargreaves: It will be taken up, your Honor.

The Court: All right. I hope so. [17]

Mr. Hargreaves: Thank you.

I assume, your Honor, that the Immigration Service will stay deportation pending the appeal, but if it becomes necessary, will your Honor consider a temporary restraining order until we have had an opportunity to get this record before the Circuit Court?

The Court: Certainly.

Mr. Grant, will you advise Immigration that I want to stay deportation until that time?

Mr. Grant: I feel sure they will, your Honor.

The Court: So it will not be necessary, Mr. Hargreaves, to get such an order at this time. If it becomes necessary, I might sign it.

Mr. Grant: I don't feel it will be necessary.

The Court: The court will be in recess.

[Endorsed]: Filed March 4, 1958.

[Endorsed]: Nos. 15959, 15960. United States Court of Appeals for the Ninth Circuit. Cheng Fu Sheng and Lin Fu Mei, Appellants, vs. Bruce G. Barber, District Director, Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 24, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 15959

United States
Court of Appeals

for the Ninth Circuit

CHENG FU SHENG,

Appellant,

VS.

BRUCE G. BARBER, District Director, Immigration
and Naturalization Service, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 31, inclusive)

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

FEB 11 1959

PAUL P. O'BRIEN, CLERK

No. 15959

United States
Court of Appeals
for the Ninth Circuit

CHENG FU SHENG, Appellant,
vs.

BRUCE G. BARBER, District Director, Immigration
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In The United States District Court, Northern
District of California, Southern Division

No. 36393—Civil

CHENG FU SHENG, Plaintiff,

vs.

BRUCE G. BARBER, District Director, Immigra-
tion and Naturalization Service, San Francisco
District, Defendant.

EXCERPT FROM DOCKET ENTRIES

1957

Apr. 29—Filed petition for writ of habeas corpus.

Apr. 29—Filed ord. show cause, returnable May 2,
1957 at 9:30 A.M. (Murphy).

* * * * *

May 1—Filed return to order to show cause.

May 2—Ordered memos. filed herein in 10 days
and case cont'd. to May 8, 1957 for subm.
(Murphy).

* * * * *

May 8—Ord. case subm. (Murphy).

* * * * *

Nov. 12—Filed opinion of Court (relief prayed by
plaintiffs denied. Findings of fact and
conclusions of law to be prepared by pre-
vailing party) (Murphy).

* * * * *

Dec. 3—Filed proposed modifications of findings
& conclusions, by plttf.

* * * * *

1958

Jan. 16—Filed findings & conclusions (Murphy).

Jan. 16—Entered judgment—filed Jan. 16, 1958—
denying habeas corpus and dismissing petition (Murphy).

Jan. 16—Mailed notices.

Feb. 12—Filed notice of appeal by plaintiff.

Feb. 12—Filed appeal bond in sum \$250.00 (cash).

Feb. 13—Mailed notices.

Mar. 4—Filed appellant's designation of record on appeal.

Mar. 4—Filed statement of points upon which appellant intends to rely on appeal.

Mar. 4—Filed reporter's transcript of hearing on modification of findings, Jan. 16, 1958.

In The United States District Court, Northern
District of California, Southern Division

Habeas Corpus No. 36393

In the Matter of the Application of Cheng Fu
Sheng, For a Writ of Habeas Corpus.

PETITION FOR WRIT OF
HABEAS CORPUS

The petition of Fallon and Hargreaves, on behalf
of Cheng Fu Sheng, respectfully shows:

I.

That the said Cheng Fu Sheng, the person in

whose behalf this Writ is applied for, is now detained and restrained of his liberty by the respondent, Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco District, and his officers and agents; that the said Cheng Fu Sheng is now confined in the detention facilities of the Immigration and Naturalization Service at 630 Sansome Street, City and County of San Francisco, State of California; or at their facilities in Santa Rita, Alameda County, California.

II.

That no previous application for a Writ of Habeas Corpus has been made by or in behalf of the said Cheng Fu Sheng, in and about the matters set forth herein to any Court.

III.

That the said Cheng Fu Sheng was arrested and found deportable by order of the respondent dated December 2, 1953.

IV.

That prior thereto, on November 3, 1953, the said Cheng Fu Sheng, filed an application for adjustment of his immigration status to that of a permanent resident pursuant to Section 6 of the Refugee Relief Act of 1953 with the respondent, Bruce G. Barber, District Director of the Immigration and Naturalization Service, San Francisco, California.

V.

That the respondent, Bruce G. Barber, denied the application of the said Cheng Fu Sheng and

that said denial was approved by David H. Carnahan, Regional Commissioner of the Southwest Region of the United States Immigration and Naturalization Service by order dated January 13, 1956.

VI.

That thereafter an action for Declaratory Judgment was filed by the said Cheng Fu Sheng in this Court and that by Order dated September 28, 1956, the Honorable Louis E. Goodman, of this Court, granted the said Cheng Fu Sheng Motion for Summary Judgment and remanded the cause for further proceedings to the United States Immigration and Naturalization Service.

VII.

That in accordance with the above-mentioned Order, said Cheng Fu Sheng was granted another hearing by respondent and that by Order dated March 18, 1957, the Examining Immigration Officer at San Francisco, California, an agent and employee of the respondent, Bruce G. Barber, denied the said Cheng Fu Sheng's application on the alleged ground that Cheng Fu Sheng's place of last residence was Formosa and that he can return thereto without fear of persecution on account of his political opinion; that by order dated April 19, 1957, the said decision of the examining officer was approved by David H. Carnahan, Regional Commissioner of the Immigration and Naturalization Service; that a copy of said Order is attached hereto, marked Exhibit "A", and made a part of

this Writ. Said order is contrary to respondent's prior pleadings and admissions before this Court.

VIII.

That the said Cheng Fu Sheng's last place of residence, in fact, is the mainland of China; that he would, in fact, be physically persecuted if deported to Communist China; that the said Cheng Fu Sheng would, in fact, be subjected to physical persecution by the governmental authorities of Formosa if deported thereto; that the decision of the respondent, Bruce G. Barber, approved by David H. Carnahan, Regional Commissioner of the Southwest Region, United States Immigration and Naturalization Service, marked Exhibit "A", is arbitrary, capricious and contrary to law.

IX.

That the decision of the respondent, Bruce G. Barber, approved by said David H. Carnahan, is a final order from which Cheng Fu Sheng has no administrative appeal.

X.

That said Cheng Fu Sheng lawfully entered the United States as a bona-fide nonimmigrant prior to July 1, 1953; that said Cheng Fu Sheng is unable to return to the country of his birth, nationality or last residence because of persecution or fear of persecution on account of political opinion; that the said Cheng Fu Sheng is, and at all times has been, a person of good moral character; that he is otherwise qualified for admission to the United

States under all provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed.

XI.

That said Cheng Fu Sheng is statutorily eligible for adjustment of his immigration status to that of a permanent resident pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953, as amended.

XII.

That counsel has been informed and therefore alleges that Bruce G. Barber, his officers and agents intend to unlawfully deport the said Cheng Fu Sheng from the United States to Formosa.

XIII.

That Cheng Fu Sheng alleges that he is unlawfully imprisoned, detained, confined and restrained of his liberty by Bruce G. Barber, aforementioned; that such detention is void and illegal; that his detention is contrary to law; that he has been denied due process of law; that the actions of Bruce G. Barber, his officers and agents, is an arbitrary and capricious abuse of administrative power; and that to deport Cheng Fu Sheng to Formosa would be unusual and inhumane punishment contrary to the laws of the United States.

Wherefore, Fallon and Hargreaves, in behalf of Cheng Fu Sheng, pray that a Writ of Habeas Corpus issue releasing the said Cheng Fu Sheng from the detention and custody of Bruce G. Barber, as District Director of the Immigration and Natural-

ization Service, San Francisco District, San Francisco, California.

FALLON & HARGREAVES,
/s/ By ARLIN W. HARGREAVES,

State of California,
City and County of San Francisco—ss.

Arlin W. Hargreaves, being first duly sworn, deposes and says:

That he is one of the attorneys for the petitioner, Cheng Fu Sheng; that petitioner is now detained and due to the emergency involved insufficient time remains in which to obtain his signature; that he has prepared said petition and knows that the contents thereof are true and correct.

/s/ ARLIN W. HARGREAVES,

Subscribed and sworn to before me this 26th day of April, 1957.

[Seal] /s/ JOSEPH P. FALLON, JR.,
Notary Public, in and for the City and County of
San Francisco, State of California.

EXHIBIT "A"

United States Department of Justice
Immigration and Naturalization Service

March 18, 1957

File: A10 491 862—San Francisco Serial No. 0048.

In re: Cheng Fu Sheng, aka Freddy Cheng or Frank Cheng.

Exhibit "A"—(Continued)

Proceedings Under Section 6 of the Refugee Relief Act of 1953.

In Behalf of Applicant: Arlin W. Hargreaves, Attorney at Law, 550 Montgomery Street, San Francisco 11, California.

Application: Adjustment of Immigration Status.

The applicant is a 31 year old married male, a native and citizen of China. He last entered the United States at the port of Honolulu, T.H. on June 9, 1952, at which time he was admitted for the duration of status under the provisions of Section 3(1) of the Immigration Act of 1924, as amended. The applicant, who was then a captain in the Chinese Nationalist Air Force, came to the United States under the mutual defense assistance program for advanced pilot training at Tyndall Air Force Base in Florida. The evidence shows that the applicant deserted his military unit on October 21, 1952, as it prepared to depart from San Francisco to Formosa. The applicant claims that he is unable to return to Formosa because he is politically opposed to the regime of Chiang Kai Shek, the President of Nationalist China. At the same time, the applicant also claims that he is as violently anti-communist as he is anti-Nationalist and that he could not return to the Mainland of China or to Formosa without fear of persecution.

A reopened hearing was conducted on December 6, 1955 in this case. On December 9, 1955 the Examining Officer recommended denial of the application for the reason that the applicant was of the

Exhibit "A"—(Continued)

class of aliens which Congress did not intend to come within the purview of the Act. On January 13, 1956 the application was denied on this ground by the Regional Commissioner. The applicant filed an application to withhold deportation to Formosa, which was subsequently denied by the Regional Commissioner on July 6, 1956. Thereafter, this case was taken into the United States District Court, N.D.C., San Francisco, California by the attorneys of record. On September 28, 1956, Judge Louis E. Goodman denied the defendant's motion to dismiss and granted the plaintiff's motion for a summary judgment. The order of the Regional Commissioner denying the application for adjustment of status under the Refugee Relief Act of 1953 was vacated and the case was remanded for further proceedings.

On February 8, 1957, a further hearing was conducted, at which time additional evidence was presented. The applicant and his attorneys contend that he deserted the Chinese Air Force in this country because of his opposition to the Nationalist Government of Chiang Kai Shek and if he returned to Formosa he would be persecuted because of his political stand. Under date of January 8, 1957 the Chinese Consul General in San Francisco officially advised this Service that his Government had directed him to declare that according to their law this applicant is subject to prosecution for desertion upon his return to Taiwan (Formosa); he will face a trial in an orderly, judicial process, in which

Exhibit "A"—(Continued)

there will be a formal indictment and the defendant is permitted to be defended by lawyers, including the right to cross-examine witnesses against him. If convicted, he will be subject to punishment according to Article 93 of the Criminal Code governing the personnel of the Army, Navy, and Air Force of the Republic of China, the maximum sentence being imprisonment for not more than 3 years. The allegation that he will be subject to persecution or death sentence is entirely groundless.

It is believed that members of the Armed Forces of China should be placed in the same category as other Government Officials holding official positions in Formosa (Taiwan). As the Chinese Nationalist Government has possession of Formosa and is there indefinitely it is believed that their residence is in Formosa. It is therefore apparent that this applicant can return to Formosa (Taiwan), the place of his last residence, without fear of persecution on account of his political opinion and the application will be denied on that ground.

Recommendation: It is recommended that the alien's application for adjustment of immigration status under the provisions of Section 6 of the Refugee Relief Act of 1953 be denied for the reason that the applicant can return to Formosa (Taiwan), the place of his last residence, without fear of persecution on account of his political opinion.

A. J. Borstadt,
Immigration Officer.

Exhibit "A"—(Continued)

Upon consideration of the entire record, and the exceptions filed, we find that the exceptions are without merit and that the application should be denied.

DAVID H. CARNAHAN,
Regional Commissioner,
Southwest Region.

So Ordered April 19, 1957.

[Endorsed]: Filed April 29, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing upon reading the Petition on file herein, it is

Ordered, that Bruce G. Barber, appear before this Court on the 2nd day of May, 1957, at the hour of 9:30 o'clock of that day to show cause, if any he has, why a Writ of Habeas Corpus should not issue herein as prayed, and that a copy of this Order be served upon him.

It Is Further Ordered that the Petitioner remain in custody within the jurisdiction of this Court until it is further ordered herein.

Dated: April 29, 1957.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed April 29, 1957.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes Now Bruce G. Barber, District Director of the Immigration and Naturalization Service, San Francisco, California, (hereinafter referred to as "respondent"), by and through his attorneys, Lloyd H. Burke, United States Attorney, and James W. Grant, Special Assistant United States Attorney, for the Northern District of California, Southern Division, and makes the following return to the order to show cause issued by the above Court on April 29, 1957 and to the petition for writ of habeas corpus:

I.

The allegations of Paragraphs I, II, III, IV, V, VI and IX are true.

II.

The allegations of Paragraphs X, XI and XIII are denied.

III.

In Paragraph VII, the allegations are true, except that after the hearing on March 18, 1957, the Immigration Officer recommended that the application of Cheng Fu Sheng be denied, and by order dated April 19, 1957 that recommendation was approved by David H. Carnahan, Regional Commissioner of the Immigration and Naturalization Service; that this order is not inconsistent nor contrary to the respondent's prior pleadings and admissions before this Court.

IV.

The allegations of Paragraph VIII are denied. The said Cheng Fu Sheng's last place of residence was found to be Formosa (Taiwan) by the Regional Commissioner of the Immigration and Naturalization Service, to which the applicant can return without fear of persecution for political opinions.

V.

The allegation in Paragraph XII that the respondent intends to deport the said Cheng is admitted, but it is denied that this deportation is unlawful.

VI.

In accordance with the order of the Honorable Louis E. Goodman, Judge of this Court, of September 28, 1956, this matter was remanded for further proceedings by the Immigration and Naturalization Service, to determine the eligibility of the petitioner under Section 6 of the Refugee Relief Act. The further proceedings of the Immigration and Naturalization Service were in all respects legal and resulted in a recommendation of the Immigration Officer that the petitioner be denied adjustment of his immigration status under the provisions of Section 6 of the Refugee Relief Act for the reason that the petitioner can return to Formosa (Taiwan), the place of his last residence, without fear of persecution on account of his political opinions, and that this recommendation was approved by the Regional Commissioner for the Southwest Region, the lawful delegate of the Attorney General in these matters.

Wherefore, the respondent prays that the petitioner take nothing by his petition herein, that the order to show cause be discharged, that the petition be denied, and the action dismissed.

Dated: May 1, 1957.

LLOYD H. BURKE,
United States Attorney,
/s/ By JAMES W. GRANT,
Special Assistant U. S.
Attorney.

Notice of Mailing Attached.

[Endorsed]: Filed May 1, 1957.

In The United States District Court, Northern
District of California, Southern Division

Nos. 36393 and 36403

CHENG FU SHENG and LIN FU MEI,
Plaintiffs,
vs.

BRUCE G. BARBER, as District Director of Immigration and Naturalization Service, San Francisco, and DAVID H. CARNAHAN, as Regional Commissioner of the Immigration and Naturalization Service, Defendants.

OPINION

Murphy, District Judge.

Upon the well reasoned authority to be found in

Wei v. Robinson, a case decided by the United States Court of Appeals, Seventh Circuit, June 28, 1957 (246 F. 2d 739) the relief sought by the petitioners, and each of them, is hereby denied.

Let the prevailing party prepare findings of fact and conclusions of law, which because of the nature of the issues involved would seem eminently appropriate in this instance.

Dated: November 12th, 1957.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed November 12, 1957.

[Title of District Court and Cause.]

PROPOSED MODIFICATIONS OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

Omit Finding of Fact XI.

Conclusions of Law

II.

Plaintiff is subject to deportation on the charge set forth in the warrant of arrest.

III.

The warrant of deportation issued by the defendant is valid.

Reasons For Objections

Objection is taken to Finding of Fact XI and

Conclusions of Law II and III. The ground of objection is that the above Finding and Conclusions pertain to plaintiff's eligibility for adjustment of status under Section 6 of the Refugee Relief Act of 1953. Although the issues were presented to the Court, it appears that no determination was made by this Court's opinion filed November 12, 1957.

Relief was denied to plaintiff upon the authority of *Wei vs. Robinson*, 246 F 2d 739. That case reviewed a declaratory judgment of the trial court which had held an order of deportation to be invalid. The only issue presented and determined by the Court in *Wei v. Robinson* was whether an alien who is admitted prior to the effective date of the Immigration and Nationality Act of 1952 as a government official and subsequently fails to maintain that status is subject to deportation under the provisions of Section 241 (a) (9) of the Immigration and Nationality Act of 1952. That Court did not consider nor decide whether or not Wei was eligible for change in status under the provisions of the Refugee Relief Act of 1953. As a factual matter, deportability in instant case was at all times conceded. To deny adjustment of status on that ground is contrary to the expressed language of the statute. In addition, the Government has over a long period of time granted permanent residence to thousands of aliens whose deportability was not contested. The Government's action was subsequently approved by Congress both under the prior Displaced Persons Act, as well as under the present

Refugee Relief Act. This Court's opinion then, based upon the decision in *Wei v. Robinson*, provides no basis for Finding of Fact or Conclusions of Law to be made concerning any other issue than that of deportability.

Dated: December 3, 1957.

Respectfully submitted,

FALLON & HARGREAVES,
/s/ By ARLIN W. HARGREAVES,
Attorneys for Appellant.

[Endorsed]: Filed December 3, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above action having come before the Court upon a Petition for Habeas Corpus, before the Honorable Edward P. Murphy, Judge of the above-entitled Court, and having been submitted by counsel on May 10, 1957, petitioner appearing by his attorneys, Fallon and Hargreaves, and defendants appearing by Lloyd H. Burke, United States Attorney, and James W. Grant, Special Assistant United States Attorney, and the Court being fully advised of the premises, makes the following findings of fact and conclusions of law.

Findings of Fact

I.

The petitioner last entered the United States

from Taiwan (Formosa) at the Port of Honolulu, Territory of Hawaii, on June 9, 1952. He was admitted as an official of the Chinese Nationalist Government in the status of a bona fide non-immigrant under the provisions of Section 3(1) of the Immigration Act of 1924, as amended (43 Stat. 153; 8 USC 203, repealed by incorporation of the provisions into 8 USC 403(a)(23) with savings clause 8 USC 405).

II.

The petitioner at the time of entry was a Captain in the Chinese Nationalist Air Force who had come to the United States under the Mutual Defense Assistance Program for advanced pilot training at Tyndall Air Force Base, Florida.

III.

On October 18, 1952, the petitioner, having completed said advanced pilot training, arrived at Fort Mason, San Francisco, California, for departure with his unit for return to Taiwan (Formosa). On October 21, 1952, the petitioner deserted his military unit in San Francisco and remained in the United States, taking civilian employment.

IV.

On December 23, 1952, the petitioner was arrested by authority of a warrant issued by the Immigration and Naturalization Service on the grounds "he has remained in the United States after failing to maintain the exempt status under which he was admitted, of an accredited official of a foreign gov-

ernment recognized by the government of the United States.”

V.

A hearing was held on deportation proceedings on March 13, 1953, and on December 2, 1953, the petitioner was granted voluntary departure with an alternate order requiring deportation in the event he did not depart voluntarily.

VI.

On May 28, 1954, petitioner filed his application under Section 6 of the Refugee Relief Act of 1953, and on January 13, 1956, after appropriate hearings, the application was denied by the Regional Commissioner.

VII.

On January 17, 1956, petitioner having been found to be an alien illegally in the United States in that he had failed to maintain the status under which he was admitted, a warrant of deportation was issued.

VIII.

The petitioner then filed for a stay of deportation under Section 243(h) of the Immigration and Nationality Act of 1952, and on July 6, 1956, after appropriate hearings, the application was denied by the Regional Commissioner.

IX.

In an action for declaratory judgment filed July 12, 1956, this Court on September 28, 1956, vacated the order of the Regional Commissioner denying the application for adjustment of status and re-

manded the case to respondent for further proceedings to determine whether the petitioner was eligible for relief under Section 6 of the Refugee Relief Act.

X.

On April 19, 1957, after further hearings, the Regional Commissioner denied the plaintiff's application under Section 6 of the Refugee Relief Act on the grounds that the petitioner did not come within the provisions thereof since he is not unable to return to Taiwan (Formosa), the place of his last residence, because of persecution or fear of persecution on account of race, religion or political opinion.

XI.

The petitioner's place of last residence is Taiwan (Formosa) and the petitioner is able to return to Taiwan (Formosa) without persecution or fear of persecution on account of his race, religion or political opinion.

Conclusions of Law

I.

The petitioner's status as a non-immigrant entitled to remain in the United States terminated when he deserted his Air Force group and took work other than specified in the terms of his admission.

II.

Upon the termination of his status as a bona fide non-immigrant within the meaning of Section 6 of the Refugee Relief Act, petitioner became ineligible for the benefits of that Act.

III.

The petitioner is not eligible for consideration under Section 6 of the Refugee Relief Act since he can return to his place of last residence, Taiwan (Formosa) without persecution or fear of persecution on account of race, religion or political opinion.

IV.

Petitioner has at all times been afforded due process and a fair hearing, and there has been no abuse of administrative discretion.

V.

The petitioner is not entitled to the writ of habeas corpus which he seeks by this action.

Let Judgment be entered accordingly.

Dated: January 16, 1958.

/s/ EDWARD P. MURPHY,
United States District Judge.

Notice of Mailing Attached.

[Endorsed]: Filed January 16, 1958.

In the United States District Court, Northern
District of California, Southern Division

Civil No. 36393

In the Matter of the Application of CHENG FU
SHENG, For a Writ of Habeas Corpus.

JUDGMENT

This matter having been submitted and the Court after reviewing the administrative record, having found the petitioner has been accorded due process of law with a fair and impartial hearing and that there is no evidence of any arbitrary or capricious decision and that the detention of the petitioner is legal; and having heretofore on November 12, 1957 made and entered its order denying the relief sought by the petitioner;

It Is Hereby Ordered, Adjudged and Decreed that the writ of habeas corpus as prayed for be and the same is hereby denied and that the petition and action of the plaintiff is hereby dismissed.

Dated: January 16th, 1958.

/s/ EDWARD P. MURPHY,
United States District Judge.

Entered in Civil Docket Jan. 16, 1958.

[Endorsed]: Filed January 16, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above entitled Court, to Bruce G. Barber, District Director of Immigration and Naturalization Service, San Francisco, and to Lloyd H. Burke, Esq., United States Attorney, his attorney:

You and each of you will please take notice that Cheng Fu Sheng, the petitioner in the above entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment made and entered herein on January 16, 1958, denying the petition for a writ of habeas corpus filed herein.

Dated: February 12, 1958.

FALLON AND HARGREAVES,
/s/ By ARLIN W. HARGREAVES,
Attorneys for Petitioner.

[Endorsed]: Filed February 12, 1958.

[Title of District Court and Cause.]

CASH DEPOSIT IN LIEU OF BOND FOR COSTS ON APPEAL

The undersigned acknowledges that he and his personal representatives are bound to pay to respondent, the sum of Two Hundred Fifty (\$250.00) Dollars, and he hereby deposits in cash the sum of Two Hundred Fifty (\$250.00) Dollars into the reg-

istry of this Court in lieu of a bond for costs on appeal.

The condition upon which said deposit is made is that, whereas the Petitioner has appealed to the Court of Appeals for the Ninth Circuit by Notice of Appeal filed February 12, 1958, from the Judgment of this Court entered January 16, 1958, if the Petitioner shall pay all costs adjudged against him if the appeal is dismissed or the Judgment affirmed, or such costs as the Appellate Court may award if the Judgment is modified, then said deposit shall be returned to the undersigned, but if the Petitioner fails to perform this condition, delivery of said deposit to the respondent shall be made forthwith.

/s/ CHENG FU-SHENG,
Petitioner.

Signed and acknowledged before me this 12th day of February, 1958.

[Seal] /s/ JOSEPH P. FALLON, JR.,
Notary Public in and for the City and County of
San Francisco, State of California.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 12, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which Appellant will rely on appeal are:

1. The Court erred in finding that the Petitioner-

Appellant's place of last residence is Taiwan (Formosa).

2. The Court erred in finding that the Petitioner-Appellant is able to return to Taiwan (Formosa) without persecution or fear of persecution on account of his race, religion or political opinion.

3. The Court erred in concluding that the Petitioner-Appellant became ineligible for the benefits of Section 6 of the Refugee Relief Act upon termination of his status as a bona fide non-immigrant in the United States.

Dated: March 3, 1958.

FALLON AND HARGREAVES,
/s/ By ROBERT S. BIXBY,
Attorneys for Petitioner-
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 4, 1958.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the petitioner-appellant hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit, taken by Notice of Appeal filed February 12, 1958, the following portions of the record, proceedings and evidence in this action:

1. Petition for Writ of Habeas Corpus with attachments.
2. Order to Show Cause.
3. Return to Order to Show Cause.
4. Certified copy of the record of the Immigration and Naturalization Service.
5. Opinion dated November 12, 1957.
6. Proposed Modifications of Findings of Fact and Conclusions of Law.
7. Reporter's transcript of hearing on Modifications of Findings.
8. Findings of Fact and Conclusions of law dated January 16, 1958.
9. Judgment dated January 16, 1958.
10. Notice of Appeal.
11. Statement of Points on Appeal.
12. This designation.
13. Docket Entries.

Dated: March 3, 1958.

FALLON AND HARGREAVES,
/s/ By ROBERT S. BIXBY,
Attorneys for Petitioner-
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 4, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Petition for Writ of Habeas Corpus.

Order to Show Cause.

Return to Order to Show Cause.

Opinion of Court.

Proposed Modifications of Findings of Fact and Conclusions of Law, submitted by Plaintiff.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Appeal Bond.

Statement of Points Upon Which Appellant Intends to Rely.

Appellant's Designation of Record on Appeal.

Defendant's Exhibit 1. (Certified copy of record of Immigration and Naturalization Service.)

Reporter's Transcript of proceedings, Jan. 16, 1958.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 24th day of March, 1958.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15959. United States Court of Appeals for the Ninth Circuit. Cheng Fu Sheng, Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 24, 1958.

Docketed: April 2, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 15959

CHENG FU SHENG, Petitioner-Appellant,

vs.

BRUCE G. BARBER, as District Director of
Immigration and Naturalization Service, San
Francisco, Respondent-Appellee.

No. 15960

LIN FU MEI, Appellant,

vs.

BRUCE G. BARBER, as District Director of
Immigration and Naturalization Service, San
Francisco, and

DAVID H. CARNAHAN, as Regional Commis-
sioner of the Immigration and Naturalization
Service, Appellees.

ORDER

Considering the Motion of Appellants for an order to consolidate the above entitled and numbered cases for the purpose of briefing, argument and submission it is this 22nd day of April, 1958,

Ordered that the above entitled cases be consolidated for the purpose of briefing, argument and submission.

/s/ ALBERT LEE STEPHENS,
Chief United States Circuit
Judge.

[Endorsed]: Filed April 22, 1958. Paul P.
O'Brien, Clerk.

Nos. 15,959 and 15,960

IN THE
United States Court of Appeals
For the Ninth Circuit

CHENG FU SHENG and LIN FU MEI,
Appellants,

VS.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,
Appellee.

**On Appeal from the United States District Court for
the Northern District of California,
Southern Division.**

BRIEF OF APPELLEE.

LYNN J. GILLARD,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
422 Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

FILED

JUN 18 1959

PAUL P. O'BRIEN, CLERK

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Nos. 15,959 and 15,960

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHENG FU SHENG and LIN FU MEI,
Appellants,

vs.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,
Appellee.

**On Appeal from the United States District Court for
the Northern District of California,
Southern Division.**

BRIEF OF APPELLEE.

JURISDICTION.

By order filed April 22, 1958 this Court authorized the consolidation of the appeals in the above two actions. The same issue is presented in each case. The principal difference is the statutory authority under which jurisdiction is invoked.

Appellant Cheng Fu Sheng sought administrative review by way of a petition for writ of habeas corpus

invoking 28 U.S.C. 2241 after having been taken into custody by appellee.

Appellant Lin Fu Mei sought administrative review by filing a complaint for declaratory judgment invoking 28 U.S.C. 2201 and 5 U.S.C. 1009.

The scope of review in each case would appear to be the same.

Sigurdson v. DelGuercio, 241 F.2d 480 (9th Cir.) 154 F. Supp. 220;

Leonard Cruz-Sanchez v. Robinson, 249 F.2d 771;

Brownell v. Tom We Shung, 352 U.S. 180

STATUTE.

Section 6 of the Refugee Relief Act of August 7, 1953 (67 Stat. 403, 1953) as amended August 31, 1954 68 Stat. 1044, (50 U.S.C. App. 1971 (d)) is quoted in full on page 3 of Appellants' brief.

STATEMENT OF THE CASE.

Cheng Fu Sheng.

Appellant Cheng Fu Sheng last entered the United States from Formosa at Honolulu, T. H. on June 9, 1952 for the duration of his status as an accredited official of a foreign government recognized by the government of the United States, Sec. 3 (1) of the Immigration Act of 1924, as amended, 8 U.S.C. 203 (1946 ed.). Appellant was then a Captain in the

Chinese Nationalist Air Force. His purpose in coming to the United States was to receive advanced pilot training at Tyndall Air Force Base under the mutual defense assistance program. On October 21, 1952 appellant Cheng deserted his military unit as it prepared to depart from San Francisco.

By order dated December 2, 1953 Cheng was found to be deportable.

On November 3, 1953 he filed an application for adjustment of his immigration status to that of permanent resident under Section 6 of the Refugee Relief Act of 1953.

On December 9, 1955 the examining officer recommended denial of the application for the reason that "the applicant was of the class of alien which Congress did not intend to come within the purview of the Act." The Regional Commission denied the application on this ground on July 6, 1956. 8 C.F.R. 245a(11). On July 12, 1956 a complaint for declaratory judgment was filed in the United States District Court.

Lin Fu Mei.

Appellant Lin Fu Mei last entered the United States from Formosa at Honolulu, T. H. on February 12, 1953. He was admitted as a foreign government official under the provisions of Section 101(a)(15)(A) of the 1952 Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(A). Lin Fu Mei, as did Cheng Fu Sheng, came to the United States as a member of the Chinese Nationalist Air Force to receive training under the

mutual defense assistance program. After completion of his training, he deserted the Chinese Nationalist Air Force and refused to return to Formosa.

Lin Fu Mei filed an application for adjustment of his immigration status under Section 6 of the Refugee Relief Act of 1953. On December 22, 1955 the examining officer recommended denial of the application for the reason that the applicant was of a class of alien which Congress did not intend to come within the purview of the Act. On February 1, 1956 the Regional Commission denied the application on this ground.

On July 17, 1956 appellant filed a complaint for declaratory judgment in the United States District Court.

JOINT ACTION.

The contentions of the appellants in their respective actions were the same. Each claimed inability "to return to the country of his birth, nationality or last residence because of persecution or fear of persecution." The application of each was denied by the Regional Commissioner for the reason that "he was of the class of alien which Congress did not intend to come within the purview of the Act." The two cases were heard together by the court below and on September 28, 1956 by joint order plaintiffs' (appellants') motions for summary judgment were granted, holding plaintiffs (appellants) to be aliens within the meaning of the word "alien" in the statute. *Cheng Fu*

Sheng v. Barber, 144 F. Supp. 913. No appeal was taken from this judgment.

On remand to the appellee, a further hearing was conducted on February 8, 1957. Appellants contended desertion because of their opposition to the Nationalist Government of Chiang Kai Shek, and persecution because of this opposition if returned to Formosa. The Chinese Nationalist Government Consul General officially advised appellee that appellants would be subject to prosecution for desertion upon return to Formosa, but that they would be accorded due process, and a fair trial, including representation by counsel, and the right to cross-examine the witnesses. (Tr. pp. 11-12).

The Immigration Officer recommended denial of the application for the reason that appellants could return to Formosa "the place of [their] last residence without fear of persecution on account of [their] political opinion." On April 19, 1957 the Regional Commissioner denied the application.

Appellant Cheng Fu Sheng was thereafter taken into custody, and on April 29, 1957 filed a petition for writ of habeas corpus. On April 30, 1957 appellant Lin Fu Mei filed a complaint for declaratory judgment.

Within the framework of the two different proceedings habeas corpus and declaratory judgment, the relief sought by each appellant is the same:

(1) That they have satisfied the eligibility requirements of the statute, so the application cannot be denied by appellee.

(2) That appellant's application must be submitted to Congress under the provision of the Refugee Act.

The District Court denied the relief sought in each case and dismissed the action.

QUESTIONS PRESENTED.

Are appellants aliens who lawfully entered the United States as bona fide non-immigrants?

Are appellants unable to return to the country of birth, or nationality, or last residence, because of persecution or fear of persecution on account of race, religion or political opinion?

ARGUMENT.

I.

APPELLANTS CAN RETURN TO "COUNTRY" OF BIRTH, NATIONALITY AND LAST RESIDENCE.

Appellants were born within the area delineated on our maps as "China." At the time of their birth, this area was under the political domination and control of a sovereign entity, popularly known in this country as the "Chinese Nationalist Government," of whose military forces the appellants herein were members.

In 1949 the military forces of the Chinese Nationalist Government were defeated by the military forces of the Peoples Republic of China, popularly

known as "Red China," or "Communist China." The Chinese Nationalist Government retired to that portion of "China" known as "Taiwan" or "Formosa," where it has managed to remain to date. Currently the United States Government recognizes the Chinese Nationalist Government. The Peoples Republic of China is not recognized.

The statute with which we are concerned provides "That he is unable to return to the *country* of his birth, nationality or last residence" (emphasis ours).

Appellants in their brief have seized upon "residence" as the key to their contention, and have made an extensive study of the definition and meaning of the word. Engrossed in their consideration of "residence" they assumed that "China" and "country" were synonymous, with the consequent failure to distinguish "country" from "place." "China" and "Formosa" as words may identify "places" or specific areas on the surface of the earth, but do they necessarily also identify a "country."

It is the contention of appellee that the word "country" as used in the statute was intended to embody the nation, the state, the government having dominion over the "place."

A Circuit Court decision in New York in 1847, *U.S. v. The Recorder*, 27 Fed. Cases 718, provides a good "shoving off" point. An admiralty case, involving importation of colonial products contrary to the provision of the Act of Congress concerning navigation passed in 1817. The Act provided that no goods etc. shall be imported except in vessels of the United

States, or “in such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, productions . . .” The vessel, *The Recorder*, was owned by British subjects residing in England. The goods were imported from London, but they were of growth, production and manufacture of the British East Indies. The word “country” was held to mean the entire nation, and that, therefore, the Act did not compel the production or manufactures of the dependencies of Great Britain to be imported in vessels belonging to the place of production or manufacture. From page 720 (2nd col.) the following is quoted:

“It may be admitted that the term ‘country,’ used in the act, in its primary meaning, signifies place, and, in a larger sense, the territory or dominions occupied by a community, or even waste and unpeopled sections or regions of the earth; but its metaphorical meaning is no less definite and well understood, and, in common parlance, in historical and geographical writings, in diplomacy, legislation, treaties, and international codes, not to refer to sacred writ, the word ‘country’ is employed to denote the population, the nation, the state, the government, having possession and dominion over the country. Thus Vattel says: ‘The term country seems to be well understood by everybody. However, as it is taken in different senses, it may not be unuseful to give it here an exact definition. It commonly signifies the state of which one is a member.’ ‘In a more confined sense, this term signifies the state, or even more particularly the town or place of our birth.’ Vatt. Law Nat. bk. 1, c. 9, § 122. ‘When a

nation takes possession of a distant country and settles a colony there, that country, though separated from the principal establishment or mother country, naturally becomes a part of the state, equally with its ancient possessions. Whenever, therefore, the political laws or treaties make no distinction between them, every thing said of the territory of a nation ought also to extend to its colonies.' *Id.* bk. 1, c. 18, § 210. The whole of a country possessed by a nation and subject to its laws, forms it [sic] territories; and it is the common country of all the individuals of the nation. *Id.* bk. 1, c. 19, § 211.

"It is very apparent, upon the provisions of the act of 1817, that congress understood and used the term 'country' in the enlarged sense given by Vattel. Thus 'nation,' in the proviso to section 1, 'foreign prince of state' in section 3, and 'foreign power' in section 4, all represent in their connection, the same idea as 'country' in the first section. The special designation of 'citizens or subjects,' does not mark with more precision that the law had reference to political powers and agencies, than does the mere word 'country,'—the thing containing, being, by a familiar form of speech, used for that which it contains; and besides, persons could, with no propriety of language, be styled 'citizens or subjects of a country,' without understanding 'country' to mean the state or nation and not merely a section or portion of territory belonging to a nation."

From page 721 (2nd Col.) the following is quoted:

"It has been shown that, by the well known principles of public law, colonies are parts of the

dominion and country of the parent state, and the inhabitants are her subjects and citizens. It follows as a necessary consequence of that relationship that there can be no citizens or subjects of the colonies, as distinct and separate from the mother country, and that they can possess no shipping, which, in its character, ownership or employment, will be foreign to other nations, in any sense other than as belonging to their common country.”

The Supreme Court has considered “country” in several cases.

In the case of the Tariff Acts, the Court said in *Stairs v. Peaslee*, 18 How. 521, 526 that the word “country” has always been construed “to embrace all the possessions of a foreign state, however widely separated which are subject to the same supreme executive and legislative control.”

In construing legislation providing for the deportation of aliens “to the country whence they came,” the Supreme Court in *Mensevich v. Tod*, 264 U.S. 134, 136, 137 was concerned with an order deporting Mensevich to Poland. He contended that the warrant was illegal because prior to his emigration to the United States he had been a resident of Tychny, in the Province of Grodno, then a part of Russia, and that at the time the warrant was issued Grodno had not been recognized by the United States as a part of Poland, and should have been treated as a part of Russia. The facts were that when the warrant was issued and the judgment was entered, Grodno was occupied and ad-

ministered by Poland, but there was a dispute between Poland and Russia as to the boundary, and while the United States had officially recognized Poland, Grodno had not been officially recognized as either within or without the boundaries of Poland. The Supreme Court held, page 136:

“The term country is used in §50 to designate in general terms, the state which, at the time of deportation includes the place from which the alien came. Whether territory occupied and administered by a country, but not officially recognized as being a part of it, is to be deemed a part for the purposes of this section, we have no occasion to consider.”

In *Burnet v. Chicago Portrait Co.*, 268 U.S. 1, the term “foreign country” was before the Court within the meaning of the Revenue Act of 1921, §238, in a proceeding brought for the redetermination of a deficiency in income tax for the year 1923. Respondent sought credit for a proportionate part of income taxes paid by that corporation to the Commonwealth of Australia, State of New South Wales and Dominion of New Zealand. The sole question was whether New South Wales was a “foreign country” within the meaning of the statute. The Supreme Court, at page 5, opened its consideration of the question as follows:

“The word ‘country’ in the expression ‘foreign country’ is ambiguous. It may be taken to mean foreign territory or a foreign government. In the sense of territory, it may embrace all the territory subject to a foreign sovereign power. When referring more particularly to a foreign govern-

ment, it may describe a foreign state in the international sense, that is one that has a status of an international person with the rights and responsibilities under international law of a member of the family of nations; or it may mean a foreign government which has authority over a particular area or subject matter, although not an international person but only a component part, or a political subdivision, of the larger international unit. The term 'foreign country' is not a technical or artificial one, and the sense in which it is to be used in a statute must be determined by reference to the purpose of the particular legislation."

On page 7, the Court continued:

"In the instant case, the question is one of credit for income taxes paid to any foreign country. The word 'country' is manifestly used in the sense of government. And to decide what government fits the description, whether only that of a foreign power which may be considered an international person, or that of a political entity which, although not an international person, levies and collects income taxes, which may be the subject of the intended credit, it is necessary to consider the object of the enactment and to construe the expression 'foreign country' so as to achieve, and not defeat its aim."

The Court held New South Wales levied the income taxes for which credit is sought and that its government had adequate authority to impose them and that the taxes, therefore, fell within the statutory provision.

The use of the phrase "country whence he came" as used in Section 237 of the Immigration and Nationality Act has received the attention of the 2nd Circuit in several cases. In *U. S. ex rel. Karamian v. Curran*, 1927, 16 F.2d 958, the relator for writ of habeas corpus was born in Persia. He was rescued from persecution and sent to Mesopotamia. From there he went to India and then to France, where he lived for a year. He sailed to Mexico, from which country he secretly entered the United States. The Court held he had come from France "because he had been there long enough to have a place of abode, whether it was technically a residence or domicile or neither of them, [is not] material; he started from France, so he came from that country."

In two succeeding cases, the 2nd Circuit departed from this rule, *U.S. ex rel. DePaola v. Reimer*, 1939, 102 Fed.2d 40 and *U.S. ex rel. Mazur v. Comm. of Immigration*, 1939, 101 F.2d 707, declaring the country whence an alien came "has generally been held to mean the country of the alien's nativity if it does not appear that he has acquired a domicile elsewhere." In *U.S. v. Holland American Line*, 1956, 231 F.2d 373, 376 the 2nd Circuit explicitly adopted the *Karamian* rule, settled the "nativity" "abode" dispute and established the rule "The country from whence an alien comes is that country in which the alien has a place of abode and which he leaves with the intention of coming ultimately to this country."

The *Karamian* rule was further illuminated by the 2nd Circuit in *U. S. ex rel. Milanovic v. Murff*, 1957,

253 F.2d 941 by the holding "We think that the statute manifests an intention, when an alien is excluded, that the situation existing before the arrival of the alien in this country be restored so far as possible." Milanovic was born in Yugoslavia in 1925. During World War II he served in the Royal Yugoslav Navy and fought against Tito. His father was killed by Titoists. After the war he could not return to live under the Tito government. He spent 21½ years in a displaced persons camp maintained by England in Italy. He was released and shipped as a crewman on an Italian vessel. The ship arrived in New York Harbor, where he was informed he would not be paid, but would be returned to Italy for possible deportation to Yugoslavia. He jumped into the bay and swam to a tugboat and was turned over to immigration. He was determined to have entered the United States illegally, but he avoided deportation by shipping out on a Panamanian vessel. This vessel was sold. Milanovic left the vessel in Antwerp, Belgium, where he lived in a seaman's house for about 40 days. Belgian immigration authorities would not permit him to remain, so the owners of the last vessel on which he sailed transported him to New York. He was detained by immigration and ordered excluded. The Immigration and Nationality Service was unable to obtain a consent for his entry to Belgium, but they did obtain a consent for him to enter Yugoslavia and he was ordered deported to Yugoslavia. A petition for habeas corpus was filed presenting the contention that Yugoslavia is not the country from "whence he came." The Court of Appeals agreed with the District Court

Judge that Yugoslavia was not the country from which Milanovic came.

Judge Palmieri, the District Court Judge, in *In Re Milanovic's Petition*, 162 Fed. Supp. 890, 895 had found that "Milanovic's return to the country of his birth, if such were ordered, would not be a return to the jurisdiction of the government which he left. Cf. *Delaney v. Moraitis*, 4 Cir., 1943, 136 F.2d 129."

In the *Delaney* case cited for comparison by Judge Palmieri in *Milanovic*, the 4th Circuit Court of Appeals had before it another complicated "country" problem. Moraitis was born in Greece. He embarked for the United States from a port in Spain, and entered the United States as an alien seaman in 1939. He overstayed his time and was clearly deportable. 8 U.S.C. 156 provided that "The deportation of aliens provided for in this chapter shall at the option of the Attorney General, be to the country whence they came or to the foreign port at which such alien embarked for the U.S." Spain, the country from which he embarked, refused to accept him. In the meantime Greece had been overrun by Germany, and it was not possible to deport him to that territory. It had been arranged to deliver him into the custody of the Greek Government in exile in England. Moraitis sought a writ of habeas corpus, contending that as the warrant could not be executed by sending him to the area identified as Greece occupied by Germany, he should be released. The respondent contended that the warrant can be substantially executed by deporting petitioner to England to the Greek Government functioning in exile. The District Court dismissed the petition

on condition that the petitioner be not deported to any country other than Greece. *Moraitis v. Delaney*, 46 Fed. Supp. 425 (D.C.Md.). The 4th Circuit Court of Appeals (136 F2d 129) modified the order by removing the condition. The following is quoted from Page 130 of the Court of Appeals Opinion.

“It is true, of course, that the term ‘country’ as used in the statute must be construed, ordinarily, to refer to the territory from which the alien came. *Mensevich v. Tod*, 264 U.S. 134, 136, 44 S.Ct. 282, 68 L.Ed. 591. But a man’s ‘country’ is more than the territory in which its people live. The term is used generally to indicate the state, the organization of social life which exercises sovereign power in behalf of the people. *United States v. The Recorder*, 27 Fed. Cas. page 718, 721, No. 16,129. Ordinarily the state exercises sovereignty only within the territory occupied by its people; but a different situation is presented when the territory is overrun by its enemies and its government is in exile in the territory of a friendly nation exercising power in international matters in behalf of its nationals. In such case the government in exile has taken over the only exercise of sovereign power left to the people of the country and is the only agency representing the country with which a foreign government can deal.

“It must be remembered in this connection that the deportation of an alien is not a mere matter of taking him beyond the seas and setting him down on foreign soil. *Saksagansky v. Weedin*, 9 Cir., 53 F.2d 13. It must be carried out through arrangements made with the foreign government.

These arrangements are matters arising in the international relationships of the nation; and these international relationships the governments in exile are thoroughly competent to deal with. They are true governments set up and organized to protect the interests of their nationals, and their powers with regard thereto are recognized and respected by the friendly nations in whose territory they function. They exercise sovereign power, moreover, not only with respect to their nationals, but also with respect to the vessels of their countries; and it has long been recognized that a vessel partakes of the character of national territory. It appears in this case that the government of the United States recognizes the Greek government functioning in England as the government of Greece and deals with it as such. In the matter of deporting an alien who has come to this country from Greece, the government must deal with the Greek government in England; and when, under agreement with that government, it arranges to return the alien into its power, it is not unreasonable to treat such delivery as a deportation to the 'country' whence he came in accordance with the statutory requirement.

"[4] The word 'country' as used in the statute is not a technical or artificial one, and the sense in which it is used must be determined by reference to the purpose of the particular legislation. *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 5, 6; 52 S.Ct. 275, 277, 76 L.Ed. 587."

Within the field of influence of western culture or civilization, the relationship of the individual to the

collective entity of government has been considered and identified by such terms as "citizen" and "subject," "sovereign," "king," "republic," "democracy," "monarchy," etc.

From *United States v. Wong Kim Ark*, 169 U.S. 655 is quoted the following:

"The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called 'ligealty,' 'obedience,' 'faith' or 'power,' of the King. The principle embraced all persons born within the King's allegiance and subject to his protection."

And from *Chisholm v. Georgia*, 2 U.S. 419, page 454:

"To the constitution of the United States the term *sovereign* is totally unknown."

And on Page 455:

"Who, or what, is a sovereignty? What is his or its sovereignty? . . . In one sense, the term *sovereign* has for its correlative, *subject*. In this sense, the term can receive no application; for it has no object in the constitution of the United States. Under that constitution, there are *citizens*, but no *subjects*."

The point of the above two citations from *United States v. Wong Kim Ark* and *Chisholm v. Georgia* is that an individual in the terms of his "birth," "nationality," or "citizenship" as related to the "country" must be measured by the governmental entity, nation or sovereign which constitutes the so-called

“country,” as opposed to the physical area of the surface of the earth which may be involved.

From the consideration of all of the foregoing citations, the contention of appellee is clear. The appellants were born within the geographical area which they call “China” at a time when that area was controlled, or governed, by a sovereign entity identified as the “Chinese Nationalist Government.” The said area called “China” or “The Republic of China” also included the island called “Formosa” or “Taiwan.” Both appellants were members of the armed forces of the sovereign “Chinese Nationalist Government.” By October 1949 the sovereign entity “Chinese Nationalist Government” was confined within the geographic area identified as the island of “Formosa.” Another sovereign entity called the “Peoples Chinese Republic,” “Red China” or “Communist China,” by force of arms occupied and assumed control and government of the area called “China” except that portion called “Formosa.” The appellants, along with the Chinese Nationalist Government and its forces, retired into the area called “Formosa.” The Chinese Nationalist Government has, since October 1949, been confined to the area of China called “Formosa” in the exercise and performance of its sovereign function.

The conclusion from the foregoing is irresistible. The “country” of “birth,” “nationality” and “last residence” within the meaning of the Refugee Relief Act is the area of China under the sovereign control and government of the “Chinese Nationalist Government” or “Republic of China.”

II.

PROSECUTION FOR DESERTION IS NOT "PERSECUTION".

Each appellant entered the United States as an accredited official of the Chinese Nationalist Government, members of the Air Force of said "country." Each sought and obtained the benefit of advanced pilot training in the guise of such accredited officials. Instead of returning to their "country" upon completion of said training, they deserted the Chinese Nationalist Air Force. Their argument now is that they embraced certain statements of a person by the name of Dr. K. C. Wu, which said statements are critical of the Chinese Nationalist Government, and that, therefore, they will be "persecuted" if returned to the Chinese Nationalist Government. Undoubtedly they will be prosecuted for desertion, but the probability of "prosecution" is not "persecution or fear of persecution on account of race, religion, or political opinion."

III.

APPELLANTS FAILED TO MAINTAIN STATUS.

Appellants disagree with the District Court's second conclusion of law:

"Upon the termination of his status as a bona fide non-immigrant within the meaning of Section 6 of the Refugee Relief Act, petitioner became ineligible for the benefits of that Act."

This conclusion followed the Court's reliance on the Seventh Circuit Court of Appeals' decision in *Wei v.*

Robertson, 246 F.2d 739. A particularly pertinent quotation from page 744 of the *Wei* decision is the following:

“Under either act (1924 or 1953) Wei possessed a privilege pivoting on his continued maintenance of status. Even if the current savings clause were utilized, Wei would still be compelled to maintain his status. *There is nothing in either Act allowing Wei, or any other alien, from parleying permissive entry into permanent domicile by the simple expedient of refusing to leave America.*”

Wei like appellants was a member of the Chinese Nationalist Air Force admitted to the United States in 1952 under Section 3(1) of the 1924 Act for training. He also failed and refused to return to Formosa on completion of the training. The Court held maintenance of his status was dictated by the statutory standard under either the 1924 or the 1952 Act:

Page 746:

“We find nothing in the 1924 Act helpful to Wei’s case. He improved his status by refusing, and articulating his rejection, to return to Formosa and his subsequent employment simply buttresses the announced relinquishment. Wei was not admitted to this country for the purposes of becoming a civilian employee of private business. Compare: *Yee Si v. Boyd*, 9th Cir. 1957, 243 F.2d 203. Whether the statute or regulations omit mention of, or inhibit non-immigrant aliens from, taking employment is beside the mark. *The statutory standard under either act dictates maintenance of status consonant with the purpose for*

which the alien received the privilege of admission." (Emphasis added).

The District Court's reliance on the *Wei* decision fully supports the conclusion of law of which appellants complain. The bona fide quality of the entry must be sustained by maintenance of the status in order to satisfy the requirements of Section 6.

CONCLUSION.

The feeling of this Court as indicated in the case of *Yee Si v. Boyd*, 243 F.2d 203, cited by the 7th Circuit Court of Appeals in the *Wei* case for comparison, in the statement at page 204: "We do not look with favor upon this deportable alien's attempt to play ducks and drakes with the laws and the Courts of the United States" is applicable to this case.

It would not seem desirable to encourage personnel of foreign governments admitted as accredited officials to disavow their credentials and to thereby benefit because of ineffective administrative or judicial disposition.

The matter of the recognition of foreign governments, and the admission of officials in possession of proper credentials of such recognized foreign governments is not within the province of the Judicial Branch of the government of the United States. The appellants here, although "aliens," do not appear to be proper persons for consideration under Section 6. The District Court in its previous decision 146 F.

Supp. 913 has said they are. If so, then the "bona fide" character of their entry can only be established by maintenance of their status as accredited officials. In the words of the *Wei Decision* "There is nothing in either Act allowing Wei, or any other alien, from parleying permissive entry into permanent domicile by the simple expedient of refusing to leave America."

Appellants have attempted to convert their vulnerability to "prosecution," or court martial for desertion into "persecution," and would avoid return to the portion of "China" occupied by the Chinese Nationalist Government on the ground that it is not the "country" of birth, nationality, or last residence. Which "country" is to be considered as embracing the place of birth may be subject to some dispute, but that the "country" of the Chinese Nationalist Government is the "country" of nationality and last residence, appellee believes to be without doubt.

It is respectfully submitted that the judgment of the District Court is correct and should be affirmed.

Dated, San Francisco, California,

June 1, 1959.

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Nos. 15,959 and 15,960

IN THE
United States Court of Appeals
For the Ninth Circuit

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Appellants,

VS.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,
Appellee.

On Appeal from the United States District Court for
the Northern District of California,
Southern Division.

REPLY BRIEF FOR APPELLANTS.

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FILED

JUL 16 1959

PAUL P. O'BRIEN, CL

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REPLY BRIEF FOR APPELLANTS.

I. WHAT IS MEANT BY "COUNTRY" AS USED IN SECTION 6?

The main contention made in appellee's brief is that the word "country" within Section 6 of the Act refers to a governmental entity rather than a place or geographical area. Appellee proceeds to the conclusion that Formosa, which is controlled by the Republic of China is the "country" of appellants' "birth", "nationality" and "last residence" within the meaning of the Act.

The validity of appellee's contention would appear to depend, in part at least, upon the accuracy of his

assertion that Formosa (Taiwan) has been a part of China from the time of appellants' birth to the present. No authority is furnished by appellee in support of the statement at page 19 of his brief that:

“The appellants were born within the geographical area which they call ‘China’ at a time when that area was controlled, or governed, by a sovereign entity identified as the ‘Chinese Nationalist Government’. *The said area called ‘China’ or ‘The Republic of China’ also included the island called ‘Formosa’ or ‘Taiwan’.*” (Emphasis supplied.)

According to the Encyclopedia Britannica, Formosa was a part of Japan from 1895 until 1945.

“In 1895 the island was ceded to Japan by the treaty of Shimonoseki.

* * * * *

As a result of a decision reached at the Cairo Conference in November 1943, [Formosa] was formally surrendered to China on Oct. 25, 1945.”

Encyclopedia Britannica, Vol. 9 p. 520 et seq. (1957 Ed.)

Thus, it is apparent that the area called “China” or the “Republic of China” did not include the island of “Formosa” at the time of appellants' birth, as asserted in appellee's brief.

Even if the factual basis for appellee's argument were accurate, we do not believe that the conclusion reached would be sound. This is the first time this contention has been advanced in either the administrative or judicial proceedings relating to the appel-

lants. For that matter, counsel knows of no other Section 6 case where such an argument has been made by the government.

It is evident from the Court's decision in *Chien Fan Chu v. Brownell*, 247 F. 2d 790, that the government did not present such an argument, though the pertinent facts in that case were essentially similar to those in the instant case. Nor was this argument advanced in the case of General Li Tsung Jen, who entered the United States for medical treatment when he was Acting President of Formosa and thereafter applied for adjustment of status pursuant to Section 6 of the Act. Counsel, by letter dated July 16, 1957, addressed to the District Court, called attention to the fact that Congress approved the applications of General Li (0300-469349) and his wife, Li-Te-Shieh Kuo (A10245429), on July 2, 1957, by House Congressional Resolution No. 194, the Senate concurring. Furthermore, we have represented a substantial number of Chinese persons whose Section 6 applications were approved by both the Immigration Service and Congress. In no instance has the government attempted to equate "country" with governmental entity, thus, requiring the applicant to establish inability to return to Formosa.

A history of consistent administrative action should be accorded great weight and the particular practice should not be disturbed lightly unless clearly erroneous.

Costanzo v. Tillinghast, 287 U.S. 341;

Lucas v. American Code Co., 280 U.S. 445.

There could be no clearer indication that Congress intended "country", as used in Section 6, to mean territory than that body's approval of countless Section 6 applications involving Chinese persons without requiring proof of the applicants' inability to return to Formosa.

Appellee's argument rests primarily upon cases interpreting the phrase "country whence they came" contained in statutes providing for the deportation of aliens. *Mensevich v. Tod*, 264 U.S. 134, relied upon by appellee, does not appear to support his position. In that case, the alien came to the United States from Grodno, then a part of Russia. At the time of deportation in 1924, Grodno had become a part of Poland as officially recognized by the United States. The Supreme Court held that the alien could properly be deported to Poland, stating, at page 137:

"The validity of a detention questioned by a petition for habeas corpus is to be determined by the condition existing at the time of the final decision thereon. *Stallings v. Spain*, 253 U.S. 339, 343, 40 Sup. Ct. 537, 64 L. Ed. 940. Deportation to Poland is now legal."

In authorizing the alien's deportation to Poland, the Supreme Court evidently took the view that "country" means territory rather than governmental entity.

This Court has had occasion to construe the phrase "country whence they came" in at least two cases. In *Seif v. Nagle*, 14 F. 2d 416, the alien entered the United States in 1903, coming from Galicia, then a part of Austria. Galicia became a part of Poland after

World War II and the alien contended that it was erroneous to require his deportation to Poland. This Court rejected the alien's contention, relying upon *Mensevich v. Tod*, supra. In *Caranica v. Nagle*, 28 F. 2d 955, the alien had come to the United States from Macedonia, then a part of the Turkish Empire, but at the time of deportation a part of the Greek Republic. This Court held that the alien could properly be deported to Greece.

In the final analysis, appellee's argument rests upon two cases, *U. S. ex rel. Milanovic v. Murff*, 253 F. 2d 941 (C.C.A. 2) and *Delany v. Moraitis*, 136 F. 2d 129 (C.C.A. 4). Both cases appear to be inconsistent with the decisions of this Court cited above and the decision of the United States Supreme Court in *Mensevich v. Tod*, supra. In the *Delany* case, the Court was cognizant of the fact that "country" ordinarily means territory, but justified its departure from the plain meaning of the word at page 131, as follows:

"The purpose of the deportation statute with which we are dealing is to remove from this country an alien who is here contrary to our laws, and place him under the jurisdiction of the political power to which he owes allegiance. If the word 'country' as used in the statute be construed to include the government in exile of a country whose territory has been overrun by the common enemy, the purpose of the statute can be carried out and the alien placed under the jurisdiction of the country to which he owes allegiance and which is charged with his protection. If it be construed as limited to the territory of the nation,

which has been thus overrun, the purpose of the statute will be frustrated in cases of this sort; and it will result either that we must suffer an alien who has come from such a country to remain at large in our country contrary to our laws or must support him in prison until such time as he can be returned to the territory now in possession of the enemy. We do not think that any such absurd result could have been within the contemplation of Congress in the passage of the Act; and *it is well settled that statutes should be construed, if possible, so as to effectuate the purpose intended and avoid absurd consequences. . . . It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character.*" (Emphasis supplied.)

In the *Delany* case, the unusual meaning attached to the word "country" may have been warranted, inasmuch as the Court was concerned with arriving at an interpretation which would enable the administrative agencies of our government to effect the alien's deportation. Since deportation is dependent upon the existence of a receiving *government* with which the United States has diplomatic relations, it was necessary to equate "country" with "government" in order to effectuate the terms of the statute. In the instant case, we are not concerned with the interpretation of a deportation statute, so neither the *Milanovic* case nor the *Delany* case are applicable. We are dealing here with a statute enacted for the purpose of granting permanent residence status to aliens who are unable to return to their usual *place* of abode

because that *place* is now under the control of a dictatorial government. In construing Section 6 of the Act there is no reason to depart from the plain meaning of the word "country". To do so would lead to absurd results.

Looking at the Act itself, it becomes clear that Congress intended "country" to be synonymous with place or geographical area. Section 6 of the Act was designed to extend benefits to alien refugees within the United States on a somewhat equivalent basis with those provided to alien refugees abroad. Although the requirements for eligibility differ in the case of an alien within the United States, an examination of the provisions relating to aliens abroad furnishes insight as to the intention of Congress by its use of the word "country" within Section 6. Under definitions, 50 U.S.C.A. Appendix 1971 provides:

"(a) 'Refugee' means any person in a *country or area* which is neither Communist, nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his *usual place of abode and unable to return thereto. . . .*" (Emphasis supplied.)

In defining "Escapee" in sub-section (b) of 50 U.S.C.A. Appendix 1971, Congress referred to "Communist-dominated or Communist-occupied area of Europe." And in defining "German expellee" in sub-section (c) of 50 U.S.C.A. Appendix 1971, Congress referred to "areas provisionally under the administration or control or domination of any such countries." The use of "country" interchangeably with "geo-

graphical area” in the above portions of the Act clearly indicates that Congress intended “country” as used in Section 6 of the Act to mean geographical area.

We submit that there is no doubt that Congress intended “country”, within Section 6 of the Act, to be given its ordinary meaning, geographical area, rather than governmental entity as urged by appellee.

II. DOES FAILURE TO MAINTAIN STATUS RENDER APPELLANTS INELIGIBLE FOR RELIEF?

The sole authority cited by appellee in support of the District Court’s second conclusion of law is the decision of the United States Court of Appeals for the Seventh Circuit in *Wei v. Robinson*, 246 F. 2d 739. We completely agree with the holding of that Court and those portions of its decision quoted at pages 21 and 22 of appellee’s brief. However, we fail to see any connection between that case and the instant case. The *Wei* case dealt solely with the issue of deportability, holding that the failure of a non-immigrant alien to maintain status renders him deportable under either the 1924 Act or the 1952 Act. *The Wei case did not consider the alien’s eligibility for relief under Section 6 of the Refugee Relief Act of 1953, as amended, which is the issue in the case at bar.*

We can find nothing in the statute involved, regulations thereunder, or reported decisions tending to support the District Court’s second conclusion of law:

“Upon the termination of his status as a bona fide non-immigrant within the meaning of Section

6 of the Refugee Relief Act, petitioner became ineligible for the benefits of that Act.”

III. CONCLUSION.

The language quoted at pages 22 and 23 of appellee's brief from *Yee Si v. Boyd*, 243 F. 2d 203, and the *Wei* case is hardly applicable to this case. Neither the *Yee* nor *Wei* cases involve judicial review of an administrative decision denying an application for relief provided for by an Act of Congress. Appellee, by his use of the quotations referred to above, appears to have overlooked the fact that appellants have filed applications under Section 6 and that they believe, in good faith, that they are eligible for the benefits of Section 6. Indeed, the District Court in its previous decision, 146 F. Supp. 913, held that appellants were so eligible.

If anyone has played “ducks and drakes with the laws and the Courts of the United States” it is the government. The appellants' applications under Section 6 have been denied by the government on every conceivable pretext, thus, preventing the applications from being considered by Congress.

We respectfully submit that the judgment of the District Court should be reversed.

Dated, San Francisco, California,
July 7, 1959.

FALLON AND HARGREAVES,
Attorneys for Appellants.



